128-40

128-40

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1404.~~ 993

THE UNITED STATES EX REL: CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 2, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1404.

THE UNITED STATES EX REL: CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Petition for mandamus	1	1
Order referring cause to General Term	7	4
Judgment dismissing petition	8	4
Order fixing amount of bond	8	5
Bond	10	5
Writ of error	11	6
Citation	11	6
Proof of service of writ of error and citation	12	7
Certificate to record	13	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 12, 1888.

1 *Petition for Mandamus. Filed Dec.* 15, 1887.

In the Supreme Court of the District of Columbia, the 15th day of December, 1887.

THE UNITED STATES *ex relatione* CHARLES R. MILLER
vs.
JOHN C. BLACK, Commissioner of Pensions. } No. 28316.

To the honorable the chief justice and the justices of the supreme court of the District of Columbia:

The petition of your relator, Charles R. Miller, respectfully represents—

1. That he is a citizen of the United States and of the State of Ohio, but is temporarily residing in the city of Washington and District of Columbia. He brings this suit in the name of the United States for and in his own behalf.

2. That the respondent, John C. Black, is also a citizen of the United States and of the State of Illinois, is the Commissioner of Pensions, and as such is sued.

3. And your relator alleges that he served in Company "D," 8th Ohio Cavalry, in the military service of the United States, during the late civil war; that while in said service and in the line of duty he sustained in battle such wounds and injuries as resulted
2 at the time thereof in his total and permanent helplessness; that his said wounds and injuries resulted in the necrosis of the spine, followed by anchylosis of the spinal column, the necrosis of the bones of his left leg and foot, followed by anchylosis of the left knee, ankle, and toes of the left foot and atrophy of the entire limb, whereby he became, was, and still is so totally and permanently disabled as to be rendered utterly helpless or so nearly so as to require the regular aid and attendance of another person.

4. And your relator further alleges that for his said disabilities the law provides the following rates of pension, namely, $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878.

5. But your relator alleges that the Pension Office, under the administration of the predecessors of the respondent, granted to your relator a pension for the total and permanent disability of his left leg only, and granted him a rating therefor by pension certificate No. 55356 of $15 per month from June 6, 1866; $18 per month from June 4, 1872; $24 per month from November 23, 1881, and $30 per month from March 7, 1883, instead of granting him a pension for his entire disabilities aforesaid and at the aforesaid ratings, as provided by law therefor.

6. And your relator further says that he often made application to the Pension Office to correct its said errors and often demanded of the Commissioner of Pensions for the time being the reissuance

of his said certificate with ratings so corrected as to be con-
3 formable to law and commensurate with his entire disabilities aforesaid, which are clearly established by the record and evidence on file in his said case.

But he alleges that the Pension Office, under the predecessors of the respondent, refused to comply with his demands and rejected his said applications.

7. And your relator further says that, after repeated fruitless efforts to obtain at the hands of the Pension Office a proper and impartial administration of the pension laws in his behalf, he finally appealed from the adverse action, ruling, and decision of the then Commissioner of Pensions to the honorable Secretary of the Interior for a redress for his grievances, and he says that this whole controversy between himself and the Pension Office respecting the question of the rating of his pension came before the honorable Secretary in person for his official action and decision, and he avers that the Secretary, upon a personal, careful inspection of the record and all the evidence filed therein in his case and on due consideration thereof made and rendered the following official decision:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February* 12, 1885.

The Commissioner of Pensions.

"Sir: Herewith are returned the papers in the pension claim—certificate No. 55356—of Charles R. Miller.

It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held that the pen-
4 sioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office.

Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg, for the reason that the nearest point that can be reached by hand from foot is 23 inches, and for the further reason that from 'necrosis of the lower vertebra of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves,' he is unable to bend his back.

After a careful review of all the facts in this case, the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require aid and attendance. The decision of the 6th instant is therefore overruled.

Very respectfully, H. M. TELLER, *Secretary.*"

8. And your relator avers that the said official decision of the Secretary of the Interior, so made as aforesaid, was a final adjudication of his claim in his favor, and conclusively establishes his right under the law to be rerated at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4,

1874, and $72 per month from June 17, 1878, and to paid the difference monthly between these sums and what has been allowed him; and all that remained for the then Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said final official decision of the Secretary into execution.

But your relator says that the then Commissioner of Pensions, instead of performing the whole of his ministerial duty under the decision of the Secretary aforesaid by reissuing your relator's said certificate with the increased ratings aforesaid, as provided by law, for the disabilities your relator was so finally adjudged to have had from the time of the incurrence of his said wounds and injuries, and to now have reissued your relator's certificate at $50 per month from January 14, 1885; and while this ministerial duty was thus but partially performed the respondent succeeded in the office of Commissioner of Pensions and became thereby obligated and in duty bound to execute so much of the said decision of the Secretary of the Interior as his predecessor in office had neglected or omitted to execute.

10. And your relator avers that it was and now is the simple ministerial duty of the respondent as Commissioner of Pensions, imposed by the said final judgment and decision of the Secretary, permitting and suffering the respondent to exercise no choice nor discretion in the premises, to reissue to your relator his said pension certificate at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, as provided by law for those persons who while in the military or naval service of the United States and in the line of duty shall have been so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require the regular aid and attendance of another person, and which said degree of disability your relator is finally adjudged by said decision to have; but your relator alleges that the respondent, as Commissioner of Pensions, has refused and still refuses to so reissue your relator's said pension certificate or to discharge the plain duty imposed upon him by the said official action and decision of the Secretary toward your relator, although often requested by your relator so to do.

Wherefore your relator prays as follows:

That the peremptory writ of mandamus may issue out of this honorable court, directed to the respondent, commanding him, as Commissioner of Pensions, to forthwith reissue to your relator his said pension certificate with the following ratings:

$25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, first deducting the amount that has been paid your relator; and further ordering and commanding the respondent, as Commissioner of Pensions, to do what the law requires him to do in all the premises.

And to this end your relator will ever humbly pray.

CHARLES R. MILLER.

J. G. BIGELOW,
S. S. HENKLE,
Solicitors for Relator.

DISTRICT OF COLUMBIA, *ss:*

I solemnly swear that I have heard read the foregoing petition by me subscribed and know the contents thereof; that
7 the facts therein stated of my own knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

CHARLES R. MILLER.

Subscribed and sworn to before me this 12th day of November, 1887.

RUTLEDGE WILLSON, [SEAL.]
Notary Public.

Referred to the gen. term, to be heard there in the first instance.

W. S. COX, *J.*

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing fourth Monday, January 23, 1888.

Present: Presiding, Chief Justice Edward F. Bingham, and Alexander R. Hagner, Charles P. James, and William M. Merrick, associate justices.

MONDAY, *January* 23*d*, 1888.

By order of the justices presiding the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

TUESDAY, *February* 21, 1888.

Session resumed pursuant to adjournment.
Present: Justices Bingham, James, and Cox.

* * * * * * *

8 THE UNITED STATES *ex relatione* CHARLES R. MILLER *vs.* JOHN C. BLACK, Commissioner of Pensions. } At Law. No. 28316.

For mandamus.

This cause coming on to be heard, on motion of the relator for a rule on the respondent to show cause, and counsel having been heard thereon, it is thereupon, on due consideration thereof, this 21st day of February, 1888, by the court ordered, adjudged, and decreed that

the motion be, and the same hereby is, overruled; and it is further ordered, adjudged, and decreed that the petition be, and the same hereby is, dismissed.

E. F. BINGHAM,
Chief Justice.

* * * * * * *

THURSDAY, *March* 8, 1888.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justices James and Cox.

THE UNITED STATES *ex relatione* CHARLES R. MILLER
vs.
JOHN C. BLACK, Commissioner of Pensions. } At Law. No. 28316.

For mandamus.

The petitioner in this cause having sued out a writ of error
9 to the Supreme Court of the United States on the final judgment of this court dismissing the petition, the bond is fixed in the penalty of one hundred dollars.
By the court:

E. F. BINGHAM,
Chief Justice.

10 In the Supreme Court of the District of Columbia, the 8th day of March, 1888.

THE UNITED STATES *ex relatione* CHARLES R. MILLER
vs.
JOHN C. BLACK, Commissioner of Pensions. } No. 28316.

In error.

Know all men by these presents that we, Charles R. Miller, Ira Gordon, and George Henderson, are bound unto the above-named John C. Black, Commissioner of Pensions, in the sum of one hundred dollars, to be paid to the said John C. Black, Commissioner of Pensions, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly, by these presents.

Sealed with our seals and dated this 8th day of March, 1888.

Whereas the above-named —— —— has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Charles R. Miller, relator, shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to

make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES R. MILLER. [SEAL.]
IRA GORDON. [SEAL.]
GEORGE HENDERSON. [SEAL.]

Sealed and delivered in presence of—
J. G. BIGELOW.

Approved:
E. F. BINGHAM,
Chief Justice.

[Endorsed:] Filed Mar. 9, 1888. R. J. Meigs, clerk.

11 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you, between The United States *ex relatione* Charles R. Miller and John C. Black, Commissioner of Pensions, being No. 28316, at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 9th day of March, in the year of our Lord 1888, and of the Independence of the United States the one hundred and twelfth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To John C. Black, Commissioner of Pensions:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex rel.* Charles R. Miller is plaintiff and

you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

12 [Endorsed:] No. 28316. Law. The United States *ex rel.* Charles R. Miller *vs.* John C. Black, Com'r of Pensions. P. M'ch 15, '81. Joyce. Writ of error and citation.

Served copy of the within writ of error and citation on John C. Black, Commissioner of Pensions, March 15, 1888.

A. A. WILSON, *Marshal.*

J. G. BIGELOW, *Att'y.*

13 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 16th day of March, 1888.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1404. The United States *ex rel.* Charles R. Miller, plaintiff in error, *vs.* John C. Black, Commissioner of Pensions. Filed April 2, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
CHARLES R. MILLER,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1404

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

WASHINGTON, D. C.:
BYRON S. ADAMS, PRINTER,
514 EIGHTH STREET.

Witness my hand and the seal of said court this 16th day of March, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1404. The United States *ex rel.* Charles R. Miller, plaintiff in error, *vs.* John C. Black, Commissioner of Pensions. Filed April 2, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
CHARLES R. MILLER,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1404

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

WASHINGTON, D. C.:
BYRON S. ADAMS, PRINTER,
514 EIGHTH STREET.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
CHARLES R. MILLER,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1404

In Error to the Supreme Court of the District of Columbia.

MOTION BY THE RELATOR TO ADVANCE THIS CASE UNDER CLAUSE 6, RULE 26, OF THE COURT.

And now comes the above-named relator, and moves the Court to advance this cause, and for a speedy hearing thereof, on the following grounds:

1. The petition in this case is for the peremptory writ of mandamus against the respondent as Commissioner of Pensions. It was filed in the Court below, December 15, 1887, and was certified by the Justice holding the Circuit Court to the Gen-

eral Term, to be heard in the first instance. The Court in General Term refused the relator's motion for a rule on the respondent, and dismissed his petition without a hearing thereof on the merits.

2. The Court below having refused the relator a hearing on the matters alleged in his petition, the case is still an *ex parte* proceeding, though brought into this Court by writ of error on final judgment dismissing the petition.

3. The respondent was not brought into the Court below. His citation to appear in this Court in the first instance results from the anomalous action of the Supreme Court of the District of Columbia refusing the relator the right to a hearing on his said petition. We do not admit that the respondent can be brought into Court in this manner.

4. The questions presented by the petition are of great importance to the relator, involving his legal rights under the laws of the United States.

5. The tenure of office of the respondent as Commissioner of Pensions is of uncertain duration.

We submit herewith our brief and argument on the merits of the case.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

To JOHN C. BLACK, Commissioner of Pensions,
Defendant in error.

You will please take notice that we shall on Monday, the 30th day of April, A. D. 1888, submit the motion, of which the foregoing is a copy, to the Supreme Court of the United States, for its judgment thereon.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

Supreme Court U. S.
FILED.
APR 28 1888
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
CHARLES R. MILLER,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1404

In Error to the Supreme Court of the District of Columbia.

Brief and Argument in Behalf of the Relator.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

WASHINGTON, D. C.:
BYRON S. ADAMS, PRINTER,
514 EIGHTH STREET.

eral Term, to be heard in the first instance. The Court in General Term refused the relator's motion for a rule on the respondent, and dismissed his petition without a hearing thereof on the merits.

2. The Court below having refused the relator a hearing on the matters alleged in his petition, the case is still an *ex parte* proceeding, though brought into this Court by writ of error on final judgment dismissing the petition.

3. The respondent was not brought into the Court below. His citation to appear in this Court in the first instance results from the anomalous action of the Supreme Court of the District of Columbia refusing the relator the right to a hearing on his said petition. We do not admit that the respondent can be brought into Court in this manner.

4. The questions presented by the petition are of great importance to the relator, involving his legal rights under the laws of the United States.

5. The tenure of office of the respondent as Commissioner of Pensions is of uncertain duration.

We submit herewith our brief and argument on the merits of the case.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

To JOHN C. BLACK, Commissioner of Pensions,
Defendant in error.

You will please take notice that we shall on Monday, the 30th day of April, A. D. 1888, submit the motion, of which the foregoing is a copy, to the Supreme Court of the United States, for its judgment thereon.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

Office Supreme Court U. S.
FILED.
APR 28 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
CHARLES R. MILLER,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1404

In Error to the Supreme Court of the District of Columbia.

Brief and Argument in Behalf of the Relator.

J. G. BIGELOW,
S. S. HENKLE,
Attorneys for plaintiffs in error.

WASHINGTON, D. C.:
BYRON S. ADAMS, PRINTER,
514 EIGHTH STREET.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *ex-relatione*,
CHARLES R. MILLER,
Plaintiffs in Error
vs.
JOHN C. BLACK,
COMMISSIONER OF PENSIONS,
Defendant in Error.

For Mandamus.
No. 1404

In Error to the Supreme Court of the District of Columbia.

THE RELATOR'S CASE.

The relator, Charles R. Miller, filed his petition in the court below for the peremptory writ of Mandamus against the respondent, December 15, 1887, and alleged:

1. That he was in the military service of the United States during the late civil war and served in Company "D," 8th Ohio Cavalry. That while in said service and line of duty, he sustained in battle such wounds and injuries as resulted at the time thereof in his total and permanent helplessness. That his said wounds and injuries resulted in the necrosis of the spine,

followed by anchylosis of the spinal column; the necrosis of the bones of his left leg and foot, followed by anchylosis of the left knee, ankle and toes of the left foot, and atroply of the entire limb. That he became thereby, was, and still is so totally and permanently disabled as to be rendered utterly helpless, or so nearly so, as to require the regular aid and attendance of another person.

2. That for his said disabilities the law provides the following rates of pension, namely: $25 per month from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 per month from June 17, 1878.

3. But that the Pension Office under the predecessors of the respondent, granted him a pension by Pension Certificate numbered 55,356 for the total and permanent disability of his left leg only, and at the rate of $15 per month from June 6, 1866; $18 from June 4, 1872; $24 from November 23, 1881, and $30 from March 7, 1883, instead of granting him a pension for his entire disabilities aforesaid, and at the ratings aforesaid as provided by law therefor.

4. That he had often applied to the Pension Office to correct its said errors, and often demanded of the Commissioner of Pensions for the time being, the reissuance of his said Certificate with ratings so corrected as to be conformable to law, and commensurate with his entire disabilities aforesaid, which he avers are clearly established by the record and evidence on file in his said case. But that the Pension Office under the predecessors of the respondent refused to comply with his demands and rejected his said applications.

5. That after repeated fruitless efforts to obtain at the hands of the Pension Office a proper and impartial administration of the Pension Laws in his behalf, he finally appealed from the adverse action of the then Commissioner of Pensions to the Honorable Secretary of the Interior for a redress of his grievances. And alleges that the whole controversy between himself and the Pension Office, respecting the question of the rating of his pension, came before the Honorable Secretary in

person, for his official action and decision. That the Secretary after a personal careful inspection of the record and all the evidence filed therein, in his case, and on due consideration thereof, made and rendered the following official decision:

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., *February* 12, 1885,

"THE COMMISSIONER OF PENSIONS:

"Sir: Herewith are returned the papers in the pension claim, "Certificate No. 55,356 of Charles R. Miller.

"It appears from the papers that Mr. Miller's claim was be- "fore this Department on the 6th instant, and it was held that "the pensioner is greatly disabled, and it is evident from the "papers in his case that he is utterly unable to do any manual "labor, and he is therefore entitled to $30 per month under the "act of March 3, 1883, which has been allowed him by your "office.

"Since the Departmental decision above referred to, the "papers in the claim have been carefully reconsidered by the "Department, and a personal examination of the pensioner "made, and it satisfactorily appears that he is unable to put on "his shoe and stocking on the foot of his injured leg, for the reason "that the nearest point that can be reached by hand from foot is "23 inches, and for the further reason that from necrosis of the "lower vertebræ of spine, producing anchylosis of the spinal "column and destruction of same of the spinal nerves, he is "unable to bend his back.

"After a careful review of all the facts in this case, the De- "partment is constrained to think that the pensioner comes "under the meaning of the laws granting pensions to those per- "sons who require aid and attendance. The decision of the 6th "instant is therefore overruled.

"Very respectfully,

"H. M. TELLER,

Secretary."

6. That said official decision of the Secretary of the Interior was a final adjudication of his claim in his favor, and conclusively established his right under the laws to be re-rated at $25 per month from June 6, 1866, $31.25 from June 4, 1872; $50 from June 4, 1874; and $72 per month from June 17, 1878, and to be paid the difference monthly between these sums, and what has been allowed him. And all that remained for the then Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said final official decision of the Secretary into execution.

7. But that the then Commissioner of Pensions instead of performing the whole of his ministerial duty under the decision of the Secretary, by re-issuing his certificate with the increased ratings aforesaid, as provided by law for the disabilities he was so finally adjudged to have had from the time of the incurrence of his wounds and injuries, and to now have, re-issued his certificate at $50 per month from January 14, 1885. And that while this ministerial duty was thus but partially performed, the respondent succeeded in the office of Commissioner of Pensions, and became thereby obligated, and in duty bound to execute so much of the said decision of the Secretary of the Interior, as his predecessor in office had neglected or omitted to execute.

8. That it is the simple ministerial duty of the respondent as Commissioner of Pensions, imposed by the said final judgment and decision of the Secretary, permitting and suffering the respondent to exercise no choice nor discretion in the premises, to reissue his said Pension Certificate at $25 per month from June 6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 per month from June 17, 1878, as provided by law for those persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so totally and permanently disabled as to render them utterly helpless, or so nearly so, as to require regular aid and attendance of another person, and which said degree of disability your relator is finally adjudged by said decision to have. But that the respondent, as Commissioner of Pensions, has re-

fused and still refuses to reissue his said Pension Certificate or to discharge his plain duty in the premises, although often requested so to do.

And the relator prays for the peremptory writ of mandamus to compel the respondent as Commissioner of Pensions to reissue his certificate with the ratings as aforesaid.

The Justice holding the Circuit Court certified the petition to the General Term, to be there heard in the first instance. And the same coming on to be heard on the motion of the relator for the alternative writ, or for a rule on the respondent to show cause, the General Term overruled the motion and dismissed the petition, whereupon the petitioner sued out his writ of error, gave bond, and cited the respondent to appear in this Court, although the proceedings have never progressed so far as to get the respondent into Court by the process contemplated in such case. (Record pp. 1 to 4.)

Assignment of Errors.

1. The Court erred in holding and ruling that the relator's case, as adjudicated by said decision of the Secretary, is not a "specific" case within the letter as well as the meaning of the Pension Laws.

2. The Court erred in holding and ruling that the Pension Laws do not grant a "specific" rate of pension from June 6, 1866, to the petitioner for the particular degree of disability, the Secretary of the Interior has found and adjudged the relator to have sustained in the military service and in the line of duty, to now have, and to have continuously had, since the date of his discharge.

3. The Court erred in refusing to rule and hold that the degree of disability, so finally found and adjudged by the Secretary to have been incurred by the relator in the military service and line of duty, entitles the petitioner as a matter of law, to

the specific rate of $25 per month from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 per month from June 17, 1878.

4. The Court erred in holding and ruling that the degree of helplessness, as set forth in the said decision of the Secretary, requiring aid and attendance, is not specifically pensioned at $25 per month from June 6, 1866, by the provisions of Section 4697, R. S. U. S., (*Pension Ll. 6); at $31.25 from June 4, 1872 by the provisions of Section 4698, R. S. U. S., (Pension Ll. 7); at $50 from June 4, 1874, by the provisions of the act of June 18, 1874, (Pension Ll. 35); and at $72 per month from June 17, 1878, by the operation of the act of June 16, 1880, (Pension Ll. 47).

5. The court erred in holding and ruling that the respondent as Commissioner of Pensions has any authority of law, to grant a less or different rate of pension than is specifically provided by said laws, for the specific degree of disability that the relator has been adjudged by the final decision of the Secretary, to now have and to have continuously had since discharge, from wounds and injuries received in the military service and line of duty.

6. The court erred in ruling that it is not the ministerial duty of the respondent to execute the final judgment of his official superior, rendered as aforesaid in relator's behalf.

7. The court below erred in ruling and holding that the Secretary of the Department of the Interior, has no appellate jurisdiction over the discretionary duties of the respondent as Commissioner of Pensions.

8. The court erred in holding the relator to have other legal remedy for the redress of his grievances than by mandamus.

9. The court erred in holding that the writ of mandamus will not lie to compel the respondent, as Commissioner of Pensions to perform a simple ministerial duty.

---

*For convenience of reference, the laws referred to will be found in pamphlet form as published by the Pension Office, and copies are left with the clerk for the use of the different members of the court.

10. The court erred in overruling the motion for the alternative writ, or for a rule on the respondent to show cause and in dismissing relator's petition.

The Argument

I

The contention between the petitioner and the Pension Office, and which extended back for a series of years, related exclusively to the question of the degree of his disability and the consequent rate of pension he was entitled to receive on account thereof. He maintained that his case was one of total and permanent helplessness, requiring regular aid and attendance of another person, within the meaning of the law, and that he was consequently entitled to the specific rate of pension provided for such degree of disability, and that the specific rate of $25, per month, from June 6, 1866, is established therefor by the following provision of section 4697, R. S. U. S: viz: "or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so, as to require regular aid and attendance of another person, shall be entitled to a pension of $25, per month," (Pension Ll. 6); of $31.25, per month from June 4, 1872, by the like provision of section 4698, R. S. U. S. (Pension Ll. 7); of $50 per month from June 4, 1874, by the following provision of the act of June 18, 1874, viz: "or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of $50 per month," (Pension Ll. 35); and of $72 per month from June 17, 1878, by the operation of the act of June 16, 1880, (Pension Ll. 47). This claim was resisted by the Pension Office, on the ground that the relator had not in fact the degree of disability contemplated in the law, to entitle him to such rating in the first class. Finally the claimant appealed from the adverse action of the then Commissioner of Pensions to the Secretary of the Interior, who not only examined all the evidence and proofs,

contained in the papers constituting the record in the case, but made a personal examination of the person of the claimant. The result was, that on February 12, 1885, the Secretary overruled the prior decision of the Department of February 6, 1885, and reversed the action of the Pension Office, finally holding, and so ruling, that the petitioner's case "comes under the meaning of the law granting pensions to those persons who require aid and attendance."

This it would seem, ought to have put an end to all the controversy in the case. The ruling of the Secretary was in his favor. The previous action of the Commissioner of Pensions was overruled. The case so far as it involved the exercise of judgment and discretion was at an end. All that remained to be done was the simple ministerial duty of reissuing the relator's Pension Certificate with the rate specifically provided by law, for those persons who are so disabled from causes originating in the military service and line of duty, as to require aid and attendance.

But the respondent, as Commissioner of Pensions, having refused to carry the ruling and decision of the Secretary into effect, the petitioner applied to the court below for the writ of mandamus to compel him to do so.

The case comes before this Court as an *ex parte* proceeding, and all that is incumbent upon the relator to show is that he has a good *prima facie* case to entitle him to the alternative writ, or a rule on the respondent to show cause, if any he has, why he should not execute the judgment of his official superior. That is all there is to it.

There is, and can be, no pretense that the relator's case is not one of "permanent," as contradistinguished from one of "progressive" disability. It is a "specific" case because the law "specifically" fixes the rate of pension from time to time, being fixed at $25 per month from June 6, 1866, by the provisions of Section 4697, R. S. U. S. (Pension Ll. 6); at $31.25 from June 4, 1872, by the provisions of Section 4698, R. S. U. S. (Pension Ll. 7); and at $50 per month from June 4, 1874,

by the provisions of the act of June 18, 1874, (Pension Ll. 35). These are the rates established by the terms of the law for the precise degree of disability, the relator was finally adjudged by the Secretary to have, namely, requiring "aid and attendance," and these are the precise provisions of the law, the Secretary had in view when he made his decision hereinbefore given.

Without going into an extensive discussion of the Pension Laws, we will briefly state that it is the *disability* in every case and *not* the cause that is pensionable. That the Pension Laws divide pensioners into two general classes, with respect to the degree of disability from whatsoever cause, namely, the "specific" and "nonspecific" class. The "specific" class embraces all persons who have been found to have a degree of disability from any cause, whatsoever, wounds, injuries or disease, originating in the service and line of duty, equivalent to that resulting from the loss of a hand or foot, or any higher degree of disability. The "specific" class is again subdivided into certain subclasses, according to the degree of disability. (See Sects. 4697 and 4698 R. S. U. S. acts of June 18, 1874, March 3, 1883 and August 4, 1886, Pension Ll. pp. 6, 7, 31, 56, 57, 68.) To the first class belong only those persons whose disabilities have reduced them to such a condition of helplessness as requires the regular aid and attendance of another person. In Section 4697, the loss of both hands is considered as resulting in such helplessness, while in Section 4698, the loss of either both hands or both feet is regarded as entailing this degree of helplessness. The proviso of said act of June 18, 1874 restricts the benefits of the first class even to those that have lost both hands or both feet, "unless the same shall have resulted in permanent, total helplessness, requiring the regular personal aid and attendance of another person.

It is clear that it is this degree of disability the law contemplates to entitle a claimant to a rating in the first class. And it is this particular degree of disability the Secretary has adjudged the relator to have, and to have incurred in the service and line of duty. And it is this particular degree of disability

that the law specifically pensions at $25 per month from June 6, 1866, $31.25, from June 4, 1872, and $50 from June 4, 1874, and, which the act of June 16, 1880 (Pension Ll. 47) by its operation increases to $72 per month from June 17, 1878.

The Legislature has kindly relieved the Commissioner of Pensions and all other persons of all responsibility of fixing the rate of pension for either of the "specific" classes, by having fixed the same in the law itself. The laws do not contemplate, and they never have contemplated, any increase in the rate of a "permanent" and "specific" case, except as Congress has expressly provided by law. The date of increase is fixed as well as the increase itself. The Commissioner of Pensions has absolutely nothing to do with these questions. He has fully performed all of his duties, involving the exercise of judgment and discretion, when he shall have determined the fact in the claimant's behalf that his degree of disability belongs to the "specific" class, or one of the "specific" classes, and which, and that the same was incurred in the service and line of duty. To hold that the Commissioner could go beyond this, and fix a different rate of pension than is expressly provided by law, would be in effect, to rule that the Commissioner is above the law.

The law is otherwise with reference to the cases of lesser disability that belong to the "non specific" class. This class probably includes nine-tenths of all the pensioners on the pension roll, and these persons are pensioned under the provisions of Section 4,699 R. S., U. S., (Pension Ll. 7). With respect to this class the Commissioner is charged by the law with the duty of fixing the rate of pension, as well as determining the degree of disability to belong to the "non specific" class, and that the same was incurred in service in line of duty. The only restriction on the discretionary powers of the Commissioner is that he is limited in fixing the rate to within $18 per month.

It is the *degree* of disability and *not* the cause in every case that determines the question to which of these classes a given

case belongs. And the relator having been finally adjudged by the Secretary himself to have the degree of disability which requires regular aid and attendance, and that his disability is of a permanent character, it follows that his case is within the exception made in Section 4,698½ R. S., U. S., (Pension Ll. 7), and his increase of pension is to commence from the date fixed by law for such increase, and not from a date the Commissioner of Pensions may arbitrarily fix.

A case of "progressive" disability may belong to either the "specific" or "non specific" class. To illustrate; suppose a case of disability resulting from disease. At first the disability is equivalent to that resulting from the loss of a hand or foot, but it finally progresses into a condition of helplessness requiring the aid and attendance of another person, and, accordingly, entitling the claimant to a rating in the first class. This is a case of "progressive" and "specific" disability, and the date of increase is the date of the Surgeon's certificate establishing the increase of disability. Again, let us suppose a case of "progressive" disability that is at first rated at $4 per month. The disability increases, and the Commissioner, in the exercise of his descretion, increases the rate to $15 per month. This is a case of "progressive" disability of the "non specific" class. But the disability may, and often does continue to increase until the case is transferred from the "non specific" to the "specific" class, in which case the Commissioner can no longer exercise any judgment in fixing the rate of pension.

In like manner a case of "permanent" disability may belong to either the "specific" or "non specific" class. To illustrate; The loss of both hands or both feet, or of one hand or one foot, belongs to the "specific" class, because the rate of pension is "specifically" fixed in the law, while the loss of a thumb or a finger belongs to the "non specific" class, because the rate of pension is not specified in the law, but rests in the discretion of the Commissioner of Pensions.

Now it is only in those cases that are "permanent" and

"specific" that the increase of rate dates from the time specified in the law for such increase. In such cases the date of the medical examination has nothing whatever to do with the commencement of the increase.

As before stated, there is no pretense that relator's disability has not been "permanent" and "specific." There is no chance for disagreement on this point. His physical condition with respect to his wounds and injuries of back and left leg is exactly the same now that it was at the date of discharge, and there has never been any perceptible change at any time in his condition since then. The causes of his disability are of a permanent character, and, consequently, the resulting disability must be permanent.

The case of the relator, then is within the exception of Section 4,698½ R. S., U. S., and he is entitled to his pension from the date fixed by the law, and at the rate specified by the law, which are, as we have shown, correctly set forth in his petition. And the Secretary having rendered his official decision in his favor, nothing remained but the ministerial duty of executing it according to the mandate of the law, commanding what rate shall be given.

We do not deem it necessary at this stage of the case, to discuss the question, whether the official action set forth of Secretary Teller, is conclusive on the respondent. This question may arise hereafter. It may be made an issue in the case. And because this question may be the issue between these parties, is a very good reason why the alternative writ or a rule to show cause should issue. Nor do we deem it necessary to more than merely mention at this time, the fact that the Secretary has the authority of law to revise the official action of the Commissioner of Pension, and to affirm or reverse that action, as he shall think proper.

In view of the allegations of the petition, which, for the present purposes of this case, must be taken and considered as

true, and the law applicable to the relator's case as made in his petition, we respectfully submit to the court, that the relator has made out at least a good *prima facie* case, and that the court below erred in refusing his motion for a rule on the respondent to show cause and dismissing his petition, and ought to be reversed with instructions to grant said motion.

J. G. BIGELOW,

S. S. HENKLE,

Attorneys for plaintiffs in error.

Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 993.

THE UNITED STATES ex RELATIONE CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 993.

THE UNITED STATES ex RELATIONE CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 993.

THE UNITED STATES ex RELATIONE CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

JOHN C. BLACK, COMMISSIONER OF PENSIONS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

BRIEF IN REPLY TO DEFENDANT IN FRROR.

And so, too, the assistant attorney general, in his brief for the respondent, has characterized this case as "an applica-"tion for a mandamus to compel the Commissioner of Pen-"sions to increase the allowance of the relator a pensioner," and adds, "The relator claims that he was so disabled by "wounds received in the late war as to require aid and at-"tendance, and, therefore, to become virtually helpless."

This statement of the case and of the claim of the relator is so far from stating the case correctly as to be quite disingenuous.

The case may be correctly summarized as follows: *This is an application for the writ of mandamus to compel the respond-*

ent to reissue the relator's pension certificate at the rates specifically provided by law for the particular degree of his disability as finally adjudged by the Secretary of the Interior to exist, and as evidenced by the certificate he now holds.

There is a great difference between this statement of the case, which will be found correct upon reference to the petition and the statement of the learned assistant attorney general.

The petition proceeds upon the ground that the Commissioner of Pensions has no voice at all in fixing the rate of the relator's pension; that Congress has very considerately relieved him entirely of all responsibility as to what shall be his rate of pension upon the adjudication made in his behalf by the Secretary, which is set forth in full in the petition (Record, p. 2), and which is evidenced by his pension certificate, by having specifically fixed that rate, from time to time, since June 6, 1866, in the laws themselves.

Again, the relator makes no claim as to the degree of his disability. All of the averments in the petition of the manner of the incurrence of his disability and the degree thereof are by way of inducement leading up to those allegations that present the case in its legal aspect.

And again, at page 2 of defendant's brief, it is said: "But "the relator complains that he has never been allowed the "increased rate of pension to which the Secretary's decision "entitles him."

Now, this does not meet the exigencies of this case. There is no claim nor pretense that the Secretary's decision entitles him to anything except as the law operating on that decision shall provide. The petition is couched in plain and simple language. There is no mistaking its object and purpose. The prayer is, in substance, that the respondent be compelled to obey the mandate of the law.

This case, like the two preceding cases of Rose and Dunlap, is an *adjudicated* case. Every fact, every matter and

thing whatsoever involving the exercise of judgment and discretion has been finally adjudicated, and all that remains of the case is under the *mandatory provisions* of the law. The law now rests upon it, whatever its mandate may be.

And in order to see what that mandate is, let us briefly examine the case as made by the petition. In the petition, paragraph 7 (Record, p. 2), it is averred: "And your relator "further says that, after repeated fruitless efforts to obtain at "the hands of the Pension Office a proper and impartial "administration of the pension laws in his behalf, he finally "appealed from the adverse action, ruling, and decision of the "then Commissioner of Pensions to the Honorable Secretary "of the Interior for a redress of his grievances, and he says "that this whole controversy between himself and the Pen- "sion Office respecting the question of the rating of his "pension came before the Honorable Secretary in person for "his official action and decision; and he avers that the Sec- "retary, upon a personal, careful inspection of the record "and all the evidence filed therein in his case, and on due "consideration thereof, made and rendered the following "official decision:" Then follows the Secretary's decision reversing the rulings of the Commissioner of Pensions, appealed from, and holding, "After a careful review of all the "facts in this case the Department is constrained to think "that the pensioner comes under the meaning of the law "granting pensions to those persons who require aid and "attendance," and overruling his prior decision in the case made a few days before.

Previous to this Miller's disabilities had been adjudged by the Pension Office to entitle him to a rating under the law in the second class, and he had accordingly been allowed the rate of pension specifically provided by the law for that class. His contention was that the office erred in not finding the degree of his disability equal to that specified in the law as entitling a claimant under its mandate to the specific rate provided by law for the first class, viz., $25 from June

6, 1866, $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 per month from June 17, 1878. The decision of the Secretary made good his contention, and the overruled Commissioner issues a certificate of the first class at $50 per month from January 14, 1885; but the respondent refuses to reissue it at the rates above given, which the law in plain terms declares "he shall be entitled to receive" for the degree of disability the Secretary so adjudged him to have from his said injuries, and which is evidenced by his certificate. The same degree of permanent disability that calls for $25 from June 6, 1866, calls for $31.25 from June 4, 1872, $50 from June 4, 1874, and $72 from June 17, 1878, provided the claimant had a claim pending at the time of the passage of the arrears of pension act of January 25, 1879, or had filed his claim therefor prior to July 1, 1880 (Pension Ll., pp. 43, 44, and 45). Miller's was a pending case; Dunlap's was a case filed after the passage of the said act and the amendatory act of March 3, 1879, but before July 1, 1880, the limitation therein fixed for arrears of pension.

The case is perfectly plain. The same provisions of the law that apply to Dunlap's case apply also to his, and reference is herein made to the brief in Dunlap's case in reply to defendant in error.

And does the Court ask what has been the practice of the office in such cases? I reply that there are nearly or quite three hundred thousand such cases on the pension roll, all rerated under the mandatory provisions of the arrears of pension act and the amendatory act of March 3, 1879. Does the Court ask are there any cases precisely like that of Miller? I reply that mortal man cannot distinguish the case of Miller from that of my own brother, Wilson Bigelow, certificate No. 57648, "loss of right arm below the elbow, and gun-shot wound of right thigh, resulting in an open, sloughing abscess." He was rated precisely as Miller was rated by the Pension Office—that is to say, his disabilities were adjudged to entitle him to a rating in the second class.

But upon an appeal, in 1884, to the Secretary—the same Secretary that made the adjudication in Miller's case—the Commissioner was reversed, and under that decision he was rerated and paid over $5,000 arrears of pension, as the law provides. I further reply that mortal man cannot distinguish in principle the case of Miller from that of Henry Fuller, certificate No. 59194, "loss sight right eye, left arm at the shoulder joint, left foot, and shell-wound right leg between the ankle and knee, resulting in compound comminuted fracture of both bones and a sloughing wound that has never healed." This case, through the blundering stupidity of some person or persons in the Pension Office, was rated as for the loss only of a hand and foot. Fuller was rerated and advanced to the first class in 1887, where the law directs, by the respondent himself, and paid over $5,000 arrears of pension. These two cases I have personal knowledge of. There are numerous other such cases on the roll.

But I do not ask for mandamus to compel the respondent to execute the ministerial act his predecessor left partially performed, because he has obeyed the law in other cases. The mandamus is prayed for in this case solely because the law, in express terms, enjoins the performance of the ministerial act of reissuing the relator's certificate at the rates above set out, and the relator has a clear legal right to have the same performed. That is the ground upon which the petition proceeds.

In the argument it is further objected that this is not a case for mandamus, as the law affords another remedy, to wit, by appeal to the Secretary, and we are referred to High on Extraordinary Remedies, sections 15 and 16, as an authority for the contention. The premises upon which the assistant attorney general bases his argument is that the object of this suit is to compel the respondent to execute the decision of his official superior, the Secretary. The premises being all wrong, the argument loses its force. As before stated, the petition is for a mandamus to constrain the re-

spondent to perform the ministerial act the law applicable to the Secretary's decision enjoins upon him, and not to execute the decision of the Secretary in any other sense than the law expressly requires.

And this leads to the real question, Whether the Secretary has appellate authority, in the case of the refusal of a subordinate official to perform a mere ministerial act, to compel him by a mandamus of his own, or by any other means, to obey the law. And if he has such jurisdiction, then is the remedy adequate to redress the grievance of the relator? for it must be an adequate remedy or this defence cannot be invoked.

The Court may take it for granted that, in all matters pertaining to the functions of his office, the Secretary has supervisory powers over the Commissioner of Pensions. It is so expressly provided in the organic act creating the office of Commissioner of Pensions.

But it will strike the Court as a novel proposition of law that the Secretary of the Department of the Interior has appellate jurisdiction over any official whatsoever in the matter of the performance or non-performance of a mere ministerial act, such as the law in precise term commands to be performed in behalf of the person interested in the performance thereof. It is difficult to conceive of an appellate jurisdiction taking cognizance of a matter over which and concerning which not the slightest judgment or discretion could be exercised. The right to hear an appeal carries with it usually the right to determine whether the inferior from whose act or refusal to act the appeal is taken is right or wrong. But pray tell where does the Secretary get his authority to say that the refusal of the Commissioner of Pensions to obey the mandate of the law is right? Could he affirm such refusal? And would the Commissioner be under any less obligation to obey the law if he should? But suppose the Secretary should order the Commissioner to obey the law and execute its mandate, would that make it

any the more obligatory upon the Commissioner to do what the law already enjoins upon him?

The position of the relator is that the law is above both the Secretary and the Commissioner; that the former cannot justify nor excuse its violation by the latter, nor by any act of his add one jot or tittle to the obligatory character of its commands. *Lex suprema est.* An appeal, therefore, in the case of a refusal of an inferior executive officer to perform a mere ministerial act to a superior would be a judicial farce, since it could not possibly result in any change whatever in the conditions of the parties under the law.

For a full elaboration of these views I refer the Court to the case of Amos Kendall *vs.* Stokes (12 Pet., 524). That case answers fully this objection coming from the respondent.

Referring again to the case of Marbury *vs* Madison (1 Cr., 137), I will call further attention to the many wise things said by the learned Chief Justice by quoting from the opinion at pages 171 and 172:

"It must be well recollected that in 1792 an act was passed
" directing the Secretary of War to place on the pension list
" such disabled officers and soldiers as should be reported to
" him by the circuit court, which act, so far as the duty was
" imposed on the courts, was deemed unconstitutional; but
" some of the judges, thinking that the laws might be exe-
" cuted by them in the character of commissioners, pro-
" ceeded to act and to report in that character.

" This law, being deemed unconstitutional at the circuits,
" was repealed, and a different system was established; but
" the question whether those persons who had been reported
" by the judges as commissioners were entitled, in conse-
" quence of that report, to be placed on the pension list was
" a legal question properly determinable in the courts, al-
" though the act of placing such persons on the list was to
" be performed by the head of a department.

" That this question might be properly settled Congress
" passed an act in February, 1793, making it the duty of the

"Secretary of the War, in conjunction with the Attorney "General, to take such measures as might be necessary to "obtain an adjudication by the Supreme Court of the United "States on the validity of any such rights claimed under the "act aforesaid.

"After the passage of this act a mandamus was moved "for, to be directed to the Secretary of War, commanding "him to place on the pension list a person stating himself "to be, on the report of the judges.

"There is, therefore, much reason to believe that this "mode of trying the legal right of the complainant was deemed "by the head of a department and by the highest law officer "of the United States the most proper which could be se-"lected for the purpose.

"When the subject was brought before the Court the de-"cision was not that a mandamus would not lie to the head "of a department, directing him to perform an act enjoined "by law, in the performance of which an individual had a "vested interest, but that a mandamus ought not to issue in "that case, the decision necessarily to be made of the report "of the commissioner's did not confer on the applicant a "legal right.

"The judgment in that case is understood to have decided "the merits of all claims of that description, and the persons "on the report of the commissioners found it necessary to "pursue the mode prescribed by the law subsequent to that "which had been deemed unconstitutional in order to place "themselves on the pension list."

The Chief Justice, no doubt, had reference to Hayburn's case (2 Dall., 409). Here is, at least, a recognition by the Attorney General, as early as 1793, of the right of a person, having a vested interest in the performance of a ministerial act by the head of a Department, to the writ of mandamus to enforce the performance of that act.

The vested interest of the relator in the performance of the ministerial act of reissuing his pension certificate at the

rates the law commands upon the ratified adjudication made in his behalf by the respondent amounts to over the sum of $7,500. Can the respondent "sport away that vested right "at his discretion?"

Chief Justice Marshall, eighty-five years ago, declared that this cannot be done by an executive officer.

Now, if it will afford the defendant in error or the Department of Justice any comfort, I will and do admit that this Court has, time and again, declared that it could not and would not interfere in any manner or form with the official duties of the executive branch of the Government. This constitutional doctrine was first clearly and distinctly announced April 5, 1791, by the circuit court of the district of New York, consisting of Chief Justice Jay, Mr. Justice Cushing, and District Judge Duane. On that day the Court proceeded to take into consideration the act of Congress entitled "An act to provide for the settlement of the claims of "widows and orphans barred by the limitations heretofore "established, and to regulate the claims to invalid pensions," the same being the act of 1792 referred to by Chief Justice Marshall.

These judges were unanimously of the opinion that the said act was unconstitutional, and, among other things, they were of the opinion "That by the Constitution of the United "States the Government is divided into three distinct and "independent branches, and that it is the duty of each to "abstain from and to oppose encroachments on either." (1 L. C. P. Co., 436, note.) I admit that from that day to the present time this Court has steadfastly adhered to the constitutional principle there laid down.

On the other hand, cotemporaneously with the announcement of that opinion this Court declared that the performance of a mere ministerial act by an executive officer was no part of his executive duties, and if he refused to perform the act a mandamus would lie, at the instance of a person having a vested interest in such performance, to compel him to

perform it. And this Court has at no time since then ruled or held differently in any case. It would be a strange, an anomalous, state of affairs if it was *any part* of the executive duties of an officer to *refuse* to *obey* the laws.

But it has been already shown by the repeated rulings of this Court that a mere ministerial act, the performance of which the law in precise terms enjoins, is no part of official duty appertaining to an executive office. That such an act is to be performed by the individual by virtue of the office he holds "as the officer of the law" rather than as a departmental official.

I now refer to what is said in the brief in the Dunlap case in reply to defendant in error (pp. 8 to 18, inclusive), and ask to have the same considered as if here repeated.

I respectfully submit the writ of mandamus ought to issue as prayed.

J. G. Bigelow,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES EX REL. Charles R. Miller, *vs.* JOHN C. BLACK, COMMISSIONER of Pensions. } No. 993.

BRIEF FOR DEFENDANT IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES EX REL. Charles R. Miller, *vs.* JOHN C. BLACK, COMMISSIONER of Pensions. } No. 993.

BRIEF FOR DEFENDANT IN ERROR.

This is an application for a mandamus to compel the Commissioner of Pensions to increase the allowance of the relator as a pensioner.

The relator claims that he was so disabled by wounds received in the late war as to require aid and attendance, and, therefore, to become virtually helpless.

Upon an appeal to the Secretary of the Interior, in February, 1885, the Secretary decided,

reversing the Commissioner of Pensions, that the relator was disabled to the degree of requiring aid and assistance. (Rec., p. 2.)

But the relator complains that he has never been allowed the increased rate of pension to which the Secretary's decision entitles him.

He insists that the function of the Commissioner under the Secretary's ruling is purely ministerial.

The court below dismissed the petition without bringing the Commissioner into court.

This brief is filed, therefore, by the undersigned as *amicus curiæ*.

ARGUMENT.

This is clearly not a case for the writ of mandamus.

Mandamus never lies where the law affords another remedy.

The existence or non-existence of an adequate and specific remedy at law in the ordinary forms of legal procedure is, therefore, one of the first questions to be determined in all applications for the writ of mandamus, and whenever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uni

formly refuse to interfere by the exercise of their extraordinary jurisdiction.

While the rule under consideration is a common law rule of very ancient origin, it is not confined in its application to cases where the existing remedy relied on in bar of the jurisdiction by mandamas is a common law remedy, but applies with equal force to cases where a particular or special remedy is provided by statute. Wherever, therefore, an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, mandamus will not lie. (High Ex. Rem., §§ 15, 16.)

In this case the other remedy furnished by the law is the authority of the Secretary of the Interior.

If the Commissioner has failed or refused to carry out the decision of the Secretary the relator should apply to the Secretary to compel him to do so. This he has not done. His application for a mandamus was therefore improvident, and properly dismissed.

If, on the other hand, the Secretary of the Interior had no power to reverse the Commissioner's decision, as it was held he had not to reverse a decision of the Commissioner of Patents awarding a patent (*Butterworth* v. *Hoe*, 112 U. S., 50), then the case falls within the principle of cases 991 and 992.

The relator has not made it clear that the amount in controversy is over $5,000.

It is submitted that the judgment should be affirmed.

Wm. A. Maury,
Assistant Attorney-General.

O

12-8-53

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~832~~ 503 ~~212~~ 18

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND EUGENIE HAWES, EXECUTRIX OF LAST WILL OF HORACE HAWES, DECEASED, PLAINTIFFS IN ERROR,

vs.

JAMES G. FAIR, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DIRTRICT OF CALIFORNIA.

FILED MARCH 7, 1885.

The relator has not made it clear that the amount in controversy is over $5,000.

It is submitted that the judgment should be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

128-53

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~832 503 213~~ 18

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND EUGENIE HAWES, EXECUTRIX OF LAST WILL OF HORACE HAWES, DECEASED, PLAINTIFFS IN ERROR,

vs.

JAMES G. FAIR, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DIRTRICT OF CALIFORNIA.

FILED MARCH 7, 1885.

SUPREME COURT OF THE UNITED STATES.

No.

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND EUGENIE HAWES, EXECUTRIX OF LAST WILL OF HORACE HAWES, DECEASED, PLAINTIFFS IN ERROR,

vs.

JAMES G. FAIR, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DIRTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Complaint	1	1
Summons	3	3
Appearance of Defendant	4	4
Answer of Defendant	4	4
Waiver of Jury Trial	5	5
Order joining Caroline C. Robinson as plaintiff	6	6
Special Findings, (including)	7	7
Exhibit A—Petition for Partition, etc	14	14
Exhibit B—Order publication Notice on Partition	18	18
Exhibit C—Order appointing attorney for minor heirs	19	19
Exhibit D—Decree of Distribution	19	19
Exhibit E—Order for Partition and appointing commissioner	23	23
Exhibit F—Notice by commissioner to attorney for minors	24	24
Exhibit G—Report of commissioner in Partition	25	25
Exhibit H—Order confirming Report and Decree of Partition	31	31
Exhibit I—Deed of one of the heirs to J. C. Flood	35	35
Exhibit J—Deed of Horace Hawes, deceased, to part of property	37	37
Judgment	42	42
Clerk's certificate to Judgment Roll	43	43
Bill of Exceptions	43	43
Stipulation as to affidavit of P. A. Roach	45	45
Certified copy of appointment of Eugenie Hawes, executrix of last will of Horace Hawes, deceased	48	48
Certificate to Record	52	52
Writ of Error	53	53
Allowance of Writ	53	53
Citation	54	54
Acknowledgment of service of citation	54	54

In the Circuit Court of the United States, District of California.

CAROLINE C. ROBINSON, BY JAMES A. ROBINSON HER GUARDIAN, AND HORACE HAWES,
Plaintiffs.

vs.

JAMES G. FAIR,
Defendant.

Complaint.

Caroline C. Robinson by James A. Robinson her guardian, and Horace Hawes, the plaintiffs in the above entitled cause, complain of James G. Fair, the defendant, and for cause of action allege:

I.

That on the 24th day of February, 1881, Letters of Guardianship of the person and estate of the plaintiff, Caroline C. Robinson, then Caroline C. Hawes, were issued to the above named James A. Robinson by the Superior Court of the City and County of San Francisco, State of California, having jurisdiction in the premises in pursuance of an order duly given and made in that behalf by said Court, February 23rd, 1881.

That the said James A. Robinson thereupon duly qualified as such Guardian, and ever since has been and now is the duly qualified and acting Guardian of the person and estate of the said Caroline.

That on or about the 6th day of April, A. D. 1881, the said Caroline intermarried with the said James A. Robinson.

II.

That the plaintiffs and the said James A. Robinson are citizens and residents of the State of California, and the defendant is a citizen of the State of Nevada.

III.

Said plaintiffs further allege upon and according to their information and belief that on a certain day to wit, the 1st day of December, A. D. 1881, the plaintiffs were the owners in fee, and were in possession each of an undivided one third part of all that certain lot or parcel of land situated in the City and County of San Francisco, State of California, and described as follows to wit:

Commencing at the point of intersection of the Westerly line of Sansome Street with the Southerly line of Pine Street, thence Westerly along the last mentioned line one hundred and thirty seven (137) feet and six (6) inches, thence Southerly and parallel with Sansome Street one hundred and thirty seven (137) feet six (6) inches, thence Easterly and parallel with Pine Street one hundred and thirty seven (137) feet six (6) inches to the said Westerly line of Sansome Street, thence Northerly along the last mentioned line one hundred and thirty seven (137) feet six (6) inches to the point of commencement. Same being designated and known on the Official Map of the City and County of San Francisco, as Fifty Vara Lot No. 205.

IV.

That the undivided one third part thereof was and is the separate property and estate of the said Caroline C. Robinson.

V.

That while the plaintiffs were the owners in fee, and were in possession of the premises as aforesaid to wit; on the said 1st day of December, A. D. 1881, the defendant entered upon the said premises and ousted the plaintiffs therefrom, and from the whole thereof, and ever since the said last mentioned day has unlawfully withheld and still unlawfully withholds from the plaintiffs, the possession of the premises and of the whole thereof.

That the plaintiffs are still the owners and entitled to the possession each of the undivided one third of the said lot of land.

VI.

That the value of each of the said third parts of the said lot of land is $100,000.

Wherefore, the plaintiffs pray judgment that they and each of them be let into the possession of the said lot of land, according to their respective rights therein and for costs of suit and for such other and further relief as may be meet and proper.

EDWARD J. PRINGLE and
J. C. BATES
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Horace Hawes being duly sworn deposes and says: that he is one of the plaintiffs in the above entitled action, that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters that he believes to be true.

HORACE HAWES.

Subscribed and sworn to before me this sixth day of June, 1882.

[SEAL] EDWARD CHATTIN, *Notary Public.*

Endorsed: Filed June 6th, 1882.

L. S. B. SAWYER, *Clerk.*

Summons.

UNITED STATES OF AMERICA. *Circuit Court of the United States, Ninth Circuit, District of California.*

CAROLINE C. ROBINSON, BY JAMES A. ROBINSON HER GUARDIAN, AND HORACE HAWES, *Plaintiffs.*
vs.
JAMES G. FAIR, *Defendant.*

Action brought in the said Circuit Court and the Complaint filed in the office of the Clerk of said Circuit Court in the City and County of San Francisco.

The President of the United States of America, Greeting:

To James G. Fair, defendant: You are hereby required to appear in an action brought against you by the above-named plaintiffs, in the Circuit Court of the United States, Ninth Circuit, in and for the District of California, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court in the City and County of San Francisco, within ten days after the service on you of this summons—if served in this County; or if served out of this County, then within thirty days—or judgment by default will be taken against you.

The said action is brought to recover from you the possession of certain lands and premises situated in the City and County of San Francisco, State of California, more particularly described in the original complaint on file herein and the costs of this action, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiffs will apply to the Court for the relief demanded in the Complaint herein.

WITNESS, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of June in the year of our Lord one thousand eight hundred and eighty two and of our Independence the 106th.

[L. S.] L. S. B. SAWYER, *Clerk,*

UNITED STATES MARSHAL'S OFFICE, *District of California.*

I hereby certify that I received the within writ on the 6th day of June, 1882, and personally served the same on the 26th day of June, 1882, by delivering to, and leaving with James G. Fair, said defendant named herein personally, at the City and County of San Francisco, in said District, a certified copy thereof, together with a copy of the Bill of Complaint attached thereto, certified to by the Clerk of the U. S. Circuit Court.

M. M. DREW, *U. S. Marshal.*
By W. L. McEWEN, *Deputy.*

Endorsed: Filed June 26th, 1882.

L. S. B. SAWYER, *Clerk.*

Appearance.

In the Circuit Court of the United States, District of California.

CAROLINE C. ROBINSON, BY JAMES A. ROBINSON HER GUARDIAN, AND HORACE HAWES, *Plaintiffs.*
vs.
JAMES G. FAIR, *Defendant.*
} At Common Law.

The appearance of the defendant, James G. Fair, in the above entitled action and of Wilson & Wilson, as attorneys for said defendant therein is hereby entered, and the clerk of the above entitled Court is hereby authorized and requested to enter such appearance of record in such action as of this date.

San Francisco July 29, 1882.

WILSON & WILSON
Attorneys for said defendant.

Endorsed: Filed July 29, 1882.

L. S. B. SAWYER
Clerk.

Answer of the Defendant

In the Circuit Court of the United States, District of California.

CAROLINE C. ROBINSON, BY JAMES A. ROBINSON HER GUARDIAN, AND HORACE HAWES, *Plaintiffs.*
vs.
JAMES G. FAIR, *Defendant.*
} At Common Law.

The defendant, James G. Fair, comes by his attorneys, Wilson & Wilson and for answer to the complaint of the plaintiffs, denies that on the first (1st) day of December, A. D. 1881, or at the time of the commencement of this suit, or at any time after the twenty ninth (29th) day of March, A. D. 1873, the plaintiffs were the owners in fee, or of any other estate, right or title, or that either of them was an owner in fee or of any other estate, right or title, or in possession each or either of an undivided one third ($\frac{1}{3}$) part, or of any other share of the lot or parcel of land described in the complaint, or any part thereof.

And the defendant further answering, denies that the undivided one third ($\frac{1}{3}$) part, or any other part of said lot and parcel of land, or any portion thereof, was at any time after the twenty ninth (29th) day of March, A. D. 1875, the separate or other property or estate of said Caroline C. Robinson; and denies that while the plaintiffs were or either of them was, the owners or owner of said premises or in possession thereof or of any part therof, to wit, on the first (1st) day of December, A. D. 1881, or at any other time, the defendant entered upon the said premises, or ousted the plaintiffs or either of

them therefrom or from any part thereof, and denies that he has at any time unlawfully withheld or still unlawfully withholds from the said plaintiffs or either of them, the possession of said premises or of any part thereof.

And the defendant denies that at the time of the commencement of this action, the plaintiffs were the owners or entitled to the possession each of the undivided one third ($\frac{1}{3}$) of the said lot of land and premises, or any other part whatever in the whole or any portion of said land and premises, and denies that either of said plaintiffs at the time of the commencement of this action had any estate, right, title or interest whatever in said lot or parcel of land or any part thereof.

Wherefore, the defendant prays to be hence dismissed, and that he may have judgment for his costs in this behalf expended.

WILSON & WILSON,
Attorneys for defendant.

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } *ss:*

James G. Fair being duly sworn deposes and says, that he is the defendant in the above entitled action, that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

JAMES G. FAIR.

Subscribed and sworn to before me this 28th day of July, A. D. 1882.

[SEAL] JAMES MASON,
Notary Public.

Endorsed: Service of a copy of the within is hereby admitted this 29th day of July, A. D. 1882.

EDWARD J. PRINGLE and
J. C. BATES,
Attorneys for Plaintiffs.

Filed July 29, 1882.

L. S. B. SAWYER,
Clerk.

Waiver of Jury Trial.

In the Circuit Court of the United States, District of California.

JAMES A. Robinson *et al.* *Plaintiffs.*
vs.
JAMES G. FAIR, *Defendant.*

It is stipulated by the respective parties hereto that a jury trial

be and the same is hereby expressly waived, and that said action be tried before the Court without a jury.

EDWARD J. PRINGLE, and
J. C. BATES,
Attorneys for Plaintiffs.

At a convenient time to be agreed upon, the trial shall be had before the Court without a jury.

WILSON & WILSON,
Attorneys for Defendant.

San Francisco, January 1883.
Endorsed: Filed January 12, 1883.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Order joining Caroline C. Robinson as plaintiff.

At a stated term, to-wit: the November term A. D. 1883, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the District of California, held at the Court room, in the City and County of San Francisco, on Thursday, the 13th day of December, in the year of our Lord, one thousand eight hundred and eighty-three.

Present: The Hon. George M. Sabin, U. S. District Judge, Nevada.

JAMES A. ROBINSON *et al.*
vs.
JAMES G. FAIR. } No. 2785.

This cause coming on this day for trial before the court sitting without a jury, a trial by jury having been waived by stipulation of the respective counsel herein, E. J. Pringle and J. C. Bates Esqs. appearing on behalf of the plaintiffs and R. J. and S. M. Wilson Esqs. on behalf of the defendant, on motion of counsel for the plaintiffs, the counsel for the defendant not objecting thereto, it is ordered, that Caroline C. Robinson be joined with Horace Hawes as plaintiffs herein in the place and stead of J. A. Robinson guardian of said Caroline C. Robinson. Thereupon evidence was introduced and closed. Ordered that the further trial be continued to Saturday, December 22nd, at 10 o'clock A. M.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above entitled cause.

Attest my hand and the seal of said circuit court this 22nd day of October, A. D. 1884.

[SEAL]

L. S. B. SAWYER,
Clerk.
By F. D. MONCTON,
Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND HORACE HAWES, *Plaintiffs.*
vs.
JAMES G. FAIR, *Defendant.*
No. 2785.

Special Findings.

This cause came on regularly for trial on December 13th, 1883, without the intervention of a jury; a jury having been expressly waived by stipulation in writing of the attorneys of record in said cause, duly filed with the clerk of said Court, before Hon. George M. Sabin, United States District Judge for Nevada, holding Circuit Court in San Francisco for Hon. Lorenzo Sawyer, United States Circuit Judge for the Ninth Judicial Circuit. The parties consenting thereto, Messrs. J. C. Bates and Edward J. Pringle, appearing as attorneys for the plaintiffs, and Messrs. Wilson & Wilson appearing as attorneys for the defendant; and the Court having heard the evidence of the respective parties, and the arguments of counsel, and having duly considered the same, now finds the following facts, that is to say:

I.

The plaintiffs and each of them are now and for five years last past have been residents and citizens of the State of California.

II.

The defendant is now and for five years last past has been a resident and citizen of the State of Nevada.

III.

On March 12th, 1871, one Horace Hawes, Senior, died in the City and County of San Francisco, intestate, and at the time of his death was the owner seized in fee and in the possession of the tract or parcel of land situate in the City and County of San Francisco, State of California, known as fifty vara lot, number two hundred and five (205) on the official map thereof, and particularly described in the complaint of the plaintiffs'. And said property was at the time of the death of said Horace Hawes Senior, his own separate property.

IV.

In addition to said fifty vara lot number two hundred and five (205) said Horace Hawes, Senior, at the time of his death, was the owner, seized in fee, and in the possession of a large amount of other property, real and personal, situate in said City and County of San Francisco, and in the County of San Mateo, California, and of great value.

V.

Said Horace Hawes, Senior, left surviving him as his only heirs at law his widow, Caroline Hawes and two minor children; Horace Hawes, Junior, born March 22d, 1859, and Caroline C. Hawes born August 26th, 1864, the last two of whom are plaintiffs in this action.

VI.

On the 29th December, A. D. 1871, upon due proceedings had in the Probate Court of the said City and County of San Francisco, the said Caroline Hawes, widow of said deceased Horace Hawes, was duly appointed the administratrix of the estate of said deceased, and thereupon letters of administration were duly issued to her out of said Court in due form of law. And said Caroline Hawes on the 30th day of December, 1871, duly qualified as such administratrix and entered upon the administration of said estate. And said Probate Court had jurisdiction in the premises and the proceedings aforesaid, and its orders and judgments therein were each and all duly given and made.

Said Caroline Hawes, (widow) remained administratrix as aforesaid and continued to act as such from the time of her appointment until the close of administration on the nineteenth day of April, 1875.

VII.

On the 18th day of February, 1875, said Caroline Hawes rendered to and filed in the said Probate Court of the City and County of San Francisco, her final account of her administration for final settlement and allowance, together with a report of her administration accompanying the same according to law. And at the time of filing said final account for such settlement and contemporaneously therewith, the said Caroline Hawes filed a petition for the final distribution and partition of said estate to the persons by law, entitled thereto. A full, true and correct copy of said petition for the final distribution and partition of said estate is hereinafter set forth, and marked "Exhibit A," and made a part hereof. The estate was then ready for distribution.

VIII.

That on said 18th day of February, 1875, and after the filing of said final account and said petition of final distribution, and partition of said estate, the Probate Court of said City and County of San Francisco, made and entered an order directing that notice be given to all persons interested, according to law, a full, true and correct copy of which order dated February 18th, 1875, is hereinafter set forth, marked "Exhibit B," and made a part hereof.

IX.

Pursuant to said order of said Probate Court, of the 18th day of February, 1875, being "Exhibit B" hereto annexed, the same was published once a week for four successive weeks, before said 23d

day of March, 1875, that is to say: on the 18th and 25th days of February, and upon the 4th, 11th and 18th days of March, respectively, 1875, in said *Daily Examiner*, a daily newspaper, printed and published in said city and county.

X.

On said 23d day of March, 1875, the hearing of said matters was by said Court duly postponed until the 29th day of March, 1875, on which day the said Court made an order appointing Charles H. Sawyer, an attorney at law of said Court, to represent said minor heirs, a copy of which is hereto annexed and marked "Exhibit C," and made part hereof.

XI.

On said 29th day of March, 1875, said Probate Court made and entered its further order and decree, settling and allowing the said final account of said Caroline Hawes as administratrix of the said estate of Horace Hawes, deceased; so as aforesaid filed by her in said Court on February 18th, 1875, and thereupon made and entered a decree distributing said estate, which decree was duly given, and made a full, true and correct copy of which decree is hereinafter set forth, marked "Exhibit D," and made a part hereof.

XII.

On the same day, that is to say, on the 29th day of March, 1875, immediately after making and rendering the said order and decree last aforesaid, said Probate Court made and entered its certain decree, ordering and directing partition of the real property of the estate of Horace Hawes, deceased, and appointing James L. King a commissioner for that purpose. A full, true and correct copy of said decree is hereinafter set forth and marked, "Exhibit E," and made a part hereof.

XIII.

That on the 2d day of April, 1875, a duly certified and authenticated copy of the said decree of distribution of the estate of Horace Hawes, deceased, and of said order appointing James L. King, a commissioner in the matter of the partition of said estate (and all other papers in that behalf, necessary and proper) were duly issued out of said Probate Court and duly delivered to said James L. King as commissioner aforesaid, as his warrant. And that the oath of said James L. King was immediately endorsed upon said certified copy of his appointment, and upon said certified copy of said decree distributing said estate, and in the manner and form prescribed by law.

XIV.

That on the 2d day of April, 1875, said James L. King, as commissioner aforesaid, gave notice in writing to all persons interested in the said partition of said estate; their guardians, agents, and attorneys, of the time and place, when and where he should proceed to

make such partition, which notice in writing was in the manner and form prescribed by law. A full, true and correct copy of which notice with the endorsements thereon, is hereinafter set forth and marked "Exhibit F," and made a part hereof.

XV.

That on the 8th day of April, 1875, said James L. King as commissioner aforesaid, pursuant to said notice above set forth, and at the time and place in said notice mentioned, and after having taken testimony and ordering surveys, and after taking such other steps as were necessary to enable him to form a judgment upon the matters before him, proceeded to make partition of said estate, as in his official report is hereinafter shown. And that at all of said times, all the persons interested in said partition were duly and *legally represented according to law.*

XVI.

On April 13, 1875, said James L. King, as commissioner aforesaid, presented to and filed in said Probate Court his report of his proceedings and acts in the matter of said partition (in the manner and form prescribed by law) in which report the entire said fifty vara lot number two hundred and five (205) in the complaint in this action referred to, was set apart and allotted in severalty to Caroline Hawes, widow of said deceased, and in said report various other tracts and parcels of land, both in the County of San Mateo and in the City and County of San Francisco, were set apart and allotted in severalty to the *plaintiff* herein, Horace Hawes, Junior, and also to the plaintiff herein, Caroline C. Robinson respectively, as in said report more fully appears. A full, true and correct copy of said report of said commissioner is hereinafter set forth and marked "Exhibit G," and made a part hereof.

XVII.

On the 19th day of April, 1875, said Probate Court of the City and County of San Francisco, made and entered its certain order confirming the said report of said James L. King, as commissioner as aforesaid, in all respects, and also its certain decree of partition thereon in the said estate of Horace Hawes deceased, which said orders and decrees were in the manner and form prescribed by law. A full, true and correct copy of which order confirming report of commissioner and decree of partition thereon, is hereinafter set forth marked "Exhibit H," and made a part hereof.

XVIII.

Duly authenticated and certified copies of all orders, judgments, records, instruments and decrees of said Probate Court in the matter of the estate of said Horace Hawes deceased, required by law to be recorded in the office of the recorder of the said City and County of San Francisco, and in the office of the county recorder of the County

of San Mateo, were duly recorded at the time and in the manner prescribed by law.

XIX.

That said orders and decrees of said Probate Court in the premises each and all remain now (in full force and effect), and none of them at any time have been appealed from, set aside, or modified in any respect.

XX.

After the said making, entering and recording of said orders and decrees making such distribution and partition, the plaintiffs in this action, Horace Hawes, Junior and Caroline C. Robinson, formerly Caroline C. Hawes, and also Caroline Hawes, widow, as aforesaid, and each of them, entered into the possession and enjoyment in severalty of the several tracts and parcels of land so set apart and allotted to them respectively in severalty as aforesaid and they and each of them, and their and each of their grantees respectively, have ever since and still do retain the possession and enjoyment of said several tracts and parcels of land in severalty as set apart and allotted to them in severalty in said decree of partition aforesaid.

XXI.

All matters and proceedings of every kind and character at any and all times had and taken in said Probate Court in the said estate of Horace Hawes deceased, and especially in the final distribution and partition thereof were and each of them was duly made, given and rendered pursuant to the statute in such case made and provided.

XXII.

On the 24th day of May, 1875, said Caroline Hawes, widow of said Horace Hawes deceased, who was then and had been ever since the said making, entry and recording of said "Order confirming said commisioners' report and decree of partition thereon," in the sole and exclusive possession in severalty of the whole of said fifty vara lot, number two hundred and five (205) granted, bargained and sold the said fifty vara lot, by deed of conveyance, with full covenants of warranty, to James C. Flood, for and in consideration of the sum of three hundred thousand dollars ($300,000) gold coin of the United States, to her in hand paid by him at that time, and she then and there delivered to him the possession of the whole thereof. A copy of said deed is hereunto annexed and marked "Exhibit I," and made a part hereof.

XXIII.

Said James C. Flood, after receiving such possession of the whole of said fifty vara lot number two hundred and five (205) from the said Caroline Hawes as aforesaid, remained in the exclusive quiet and peaceable possession of the same and the whole thereof, until the 21st day of August, 1876, at which time the said James C. Flood for and in consideration of said three hundred thousand dollars

($300,000) to him in hand paid by James G. Fair, the defendant in this action, made and executed to said Fair, his certain deed of conveyance purporting to grant, bargain and sell the whole of said fifty vara lot, number two hundred and five (205) and then and there transferred and delivered to him, said Fair, the possession of the same and the whole thereof, and said Fair has ever since said last named day remained and is now in the exclusive, quiet, and peaceable possession of the whole thereof.

XXIV.

On the 6th day of August, 1881, said plaintiffs herein demanded of said defendant James G. Fair, to be let into possession of two-thirds undivided parts of said fifty vara lot number two hundred and five (205) which demand said Fair then and there refused and still refuses, and that this action was not commenced until the 6th day of June, 1882.

XXV.

On the 24th day of February, 1881, upon due proceedings had James A. Robinson was appointed guardian of the person and estate of said plaintiff, Caroline C. Hawes, by the Superior Court, Department No. 9, of the City and County of San Francisco, and remained such guardian until August 26th, 1882, at which time she attained her legal majority.

On the 19th day of April, 1881, said plaintiff, Caroline C. Hawes was intermarried with the said James A. Robinson, and they have ever since remained husband and wife.

XXVI.

The value of the whole of said fifty vara lot, number two hundred and five (205) was in May 24th, 1875, three hundred thousand dollars ($300,000.), since which time substantial improvements have been placed thereon by the defendant herein of the value of several hundred thousand dollars.

The said lot without regard to the improvements was of the value of three hundred thousand dollars ($300,000) and upwards at the time of the commencement of this action.

XXVII.

On the thirty-first day of October, A. D. 1870, the said Horace Hawes since deceased, executed his certain instrument in writing, a copy of which is hereunto annexed marked "Exhibit J," and made a part hereof.

On the 16th day of February, 1874, on due proceedings had in a certain action then pending in the District Court of the Third Judicial District of the State of California, in which said Caroline Hawes was plaintiff, and the parties of the second part in said deed of the 31st, October, 1870, were defendants; it was adjudged and decreed that the said parties of the second part had

no right, title or interest in or to the north-easterly half of said Mission Block 44, described in said deed, and the title to the same was adjudged to be in the said Caroline Hawes.

On the 13th day of August, A. D. 1878, in a certain action then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, in which the parties of the second part in said deed of the 31st October, A. D. 1870, were plaintiffs, and sought to enforce said trust as to the north-westerly one-half (½) of said Block 44, and said Caroline Hawes, Caroline C. Hawes and Horace Hawes, Junior, were defendants. It was upon due proceedings had ordered and decreed that said trust referred to in said deed was too indefinite and impracticable to be executed by said Court in its judicial capacity, and the provisions therein being mandatory prohibiting any change of scheme or modification, had failed, and that said parties of the second part in said deed of trust should execute a deed of release and quit claim of said north-westerly one-half (½) of said Block 44, to said Horace Hawes, Junior, and said Caroline C. Hawes, which was accordingly done before the commencement of this action.

And as conclusions of law from the foregoing facts the Court finds that said Probate Court of the City and County of San Francisco, had and acquired full and complete jurisdiction of the said estate of Horace Hawes deceased, during the whole of the said administration thereof and at the said final distribution and partition thereof as well of the subject matter thereof as of all the persons interested at all times therein, and that all matters and proceedings of every kind and character at any and all times had and taken in said Probate Court in the said estate of Horace Hawes deceased, and especially in the final distribution and partition thereof were and each of them was had, taken and conducted in strict and full compliance with law and according to the statutes of the State of California in such case made and provided. And all said orders and decrees aforesaid were duly given and made.

That all the title to said fifty vara lot, number two hundred and five which was vested in said Horace Hawes at the time of his death passed to and became and was on the 19th day of April, 1875, by virtue of the said administration of his said estate and all the acts and proceedings had and taken therein and by virtue of said decree of final distribution and partition, vested in the said Caroline Hawes, widow of said Horace Hawes deceased and that said title was so vested in her on May 24th, 1875, when she granted, bargained and sold the said fifty vara lot, number two hundred and five (205) to said James C. Flood, the grantor of the defendant James G. Fair herein.

That said plaintiffs have not nor has either of them any right, title or interest in or to said fifty vara lot number two hundred and five (205) or of any part thereof, at the commencement of this suit, and are not entitled to the possession of the same or of any part thereof.

That the title to the said property described in said complaint is vested in said defendant, James G. Fair, and that he is entitled to

have and retain the posssession of the same and the whole thereof. And that said defendant have judgment against said plaintiffs, Horace Hawes and Caroline H. Robinson for his costs.

Let judgment be entered accordingly.

GEO. M. SABIN,
United States District Judge.

Dated San Francisco, Cal. Oct. 21st, 1884.

"EXHIBIT A."

In the Probate Court of the City and County of San Francisco.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED.

To the Hon. the Probate Court of the City and County of San Francisco:

Your petitioner, Caroline Hawes, respectively represents that she is the widow of Horace Hawes deceased and that Horace Hawes aged 16 years and Caroline C. Hawes aged 10 years, and your petitioner are the only heirs at law of said decedent.

That said Horace Hawes died intestate in this city and county, on the 12th day of March, 1871, leaving very valuable property and estate in said City and County and the County of San Mateo.

That said decedent died possessed of but little personal property besides his law library, and that all said personal property except library was set apart to your petitioner as the widow of said decedent, and said law library, English and Spanish, was by decree of this Court set aside for the use of said heir, Horace Hawes.

That there is a large amount of Real Estate remaining in possession of your petitioner as the administratrix of said estate, subject to distribution and partition.

That the final account of your petitioner, as administratrix of said estate has been filed in this Court for settlement and approval, which said account shows that your petitioner has overpaid from her own property and funds claims, debts, taxes, and other expenses of said estate.

That the monthly income of said estate in San Francisco, from March 1st, 1875, will be $1,110 per month, U. S. gold coin.

That the real estate now remaining to be distributed among the heirs at law of said deceased, is fully set forth with sufficient particularity for identification in Schedule A, hereto annexed and made a part hereof.

That your petitioner is in law and justice entitled to one-half interest in three-fifths (3 5) of said estate, but as the same is to go to her children, she proposes to ask an undivided half interest in about or not quite one-fifth (1-5) part thereof, to-wit: Mission Block No. 44, and easterly part of Mission Block No. 8, more particularly described in said Schedule A; and one-third ($\frac{1}{3}$) undivided in all

the rest of said estate; and said children, Horace Hawes and Caroline C. Hawes, are entitled to an undivided one-half (½) of said Mission Block 44, that is, an undivided one-quarter (¼) each, and one-quarter each in said easterly half of said Mission Block No. 8.

That your petitioner and said children, Horace Hawes and said Caroline C. Hawes are each entitled to an undivided one-third (⅓) in said Mission Block No. 2, and said fifty vara lot No. 205, which are of great value, to-wit; from $650,000 to $675,000, and that said Mission Block No. 2 prospectively is of much more value than all the rest of the estate in said City and County, belonging to said estate.

That said estate of said decedent, particularly described in said Schedule A, upon the death of said decedent, descended to your petitioner as his surviving wife and said children in the proportions as aforesaid, and that they are entitled to a distribution thereof, according to law, and that a partition and division should be now made pursuant to the statute in such cases made and provided.

That said land and real estate is so situate that the most valuable part, to-wit: Mission Block No. 2, cannot well be divided into but two equal parts, as one-half of the Mission Block contains a very little less than 6 fifty varas.

That said Mission Block No. 44 is so located as to admit of division among all the persons entitled thereto, and easterly part of Mission Block 8, from the location, should be wholly set apart to one, as your petitioner is informed and by her attorney and counsel and so believes.

That said fifty vara lot No. 205, which is subject to a lease of an unexpired term of 5 years to one J. H. Blumenberg, at the monthly rent of $1000 per month, from the 1st day of March, 1875. Your petitioner will take and pay to said heirs what is just, legal and proper, as your petitioner is informed and verily believes the same cannot be advantageously divided or partitioned.

That Redwood Farm, mentioned in Schedule A, be divided so as to give each one one-third in equal value thereof.

And your petitioner further represents that in order to save the trouble and expense of selling real estate to pay expenses of administration, she has in good faith greatly overdrawn her account with estate, and to the amount of $ which should be taken into account and consideration in the distribution and partition of said estate, and properly adjusted in dividing and distributing the same according to the respective rights of respective parties or heirs at law of said decedent.

That your petitioner is entitled by law to pay only ½ of certain portions of expense and ⅓ of the balance, and said childrens' shares be charged with the balance.

That said Mission Block No. 44, and easterly half of said Mission Block 8 were acquired in 1860, and after the marriage of your petitioner to said decedent, and each of said parcels of land is common property.

Wherefore your petitioner prays this Honorable Court that a de-

cree of partition and distribution may be ordered, that the real estate held in common and undivided between the estate of Horace Hawes, deceased, may be divided, and that the separate estate of said deceased may be divided, allotted and distributed to and among the heirs, according to their several and respective rights and interests upon the appointment of a commissioner or commissioners, and the proper proceedings to be had according to the statute in such cases made and provided, or if the said land or any part thereof, cannot otherwise be fairly divided without prejudice or inconvenience among the parties interested acording to the respective rights of each and all the several estates and persons entitled; then such proceedings be had to adjust the same provided by law, and that said heirs at law of said deceased and each of them respectively, may receive the portions of said estate coming to them, and that they and each of them may have all the benefit and relief to which they may be entitled. To which end your petitioner prays that an order may be made directing that all persons interested in this estate, appear before this Court at a time and place to be specified, not less than four, or more than ten weeks from the time of making said order, to show cause why an order should not be granted directing that partition be made in said estate, and that distribution be made of the estate of Horace Hawes, deceased; and that partition be made of the real estate thereof, among the persons entitled thereto; or if the same cannot otherwise be fairly divided, that the same be sold and the proceeds be distributed among those entitled; or that such other or further or different order may be made as will be just and proper in the premises. And your petitioner will ever pray, etc.

Dated 17th day of February, 1875.

CAROLINE HAWES,

Administratrix of the estate of Horace Hawes, deceased.

STATE OF CALIFORNIA }
City and County of San Francisco. } *ss.*

Caroline Hawes, administratrix of the estate of Horace Hawes, deceased, being duly sworn says: that she is the petitioner mentioned in the foregoing petition. That she has heard read the foregoing petition and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and that as to those matters she believes it to be true.

CAROLINE HAWES,

Subscribed and sworn to before me this 17th day of February, 1875.

[L. S.] PALMER G. WOOD,

Notary Public.

Endorsed: Petition for final distribution and partition.

Filed February 18th, 1875.

WM. HARNEY, *Clerk.*
By A. J. JEGHERS, *Deputy Clerk.*

"SCHEDULE A" TO "EXHIBIT A."

In the Probate Court of the City and County of San Francisco.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED. } No. 4240.

The following is the estate of said deceased remaining to be distributed among the heirs.

I.

Mission Block No. 44 bounded by Ninth, Tenth, Harrison and Bryant streets.

II.

Southeasterly portion of Mission Block No. 8 bounded by Folsom, Tenth, Harrison and Juniper street and school lot, the same fronting 550 feet on Tenth street, 205 feet on Folsom, 412½ feet on Juniper street, 137½ and 68 9-12 feet on School lot and 136 3-12 feet on Harrison street.

III.

Mission Block No. 2 bounded by Howard and Folsom, Ninth and Tenth streets.

IV.

Fifty vara lot No, 205 in Block 55 at the southwest corner of Pine and Sansome streets.

All the above being in the City and County of San Francisco, State of California.

V.

Redwood Farm near the Town or City of Redwood City in San Mateo commonly known and called by the name of Hawes' Ranch containing 1929 76-100 acres.

VI.

Villa lots Nos. 13 and 14 in the City limits of Redwood City.

CAROLINE HAWES,
Administratrix of the estate of Horace Hawes, deceased.

"EXHIBIT B."

In the Probate Court of the City and County of San Francisco, State of California.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, deceased.

Order of Publication of Notice on Settlement of Final Account and Petition for Distribution and Partition of Estate of said Decedent.

On reading and filing the report and petition of Caroline Hawes, administratrix of the estate of Horace Hawes, deceased, duly verified, presented and filed at the time of, and in connection with, the final account of her administration, and it duly appearing that said estate is in a proper condition to be closed and distributed and partitioned among the persons entitled, and that all debts and claims against said estate have been paid, except certain claims of the estate against its distributees, the only heirs at law of said decedent which may be taken into account and properly adjusted and disposed of in the distribution and partition of said estate, according to law.

On motion of J. C. Bates, attorney for said administratrix, it is ordered that all persons interested in said estate, be and appear before the Probate Court of the City and County of San Francisco, at the Court-room of said Court, in the City Hall in said city and county, on Tuesday, the twenty-third day of March, A. D. 1875, at eleven o'clock A. M. of that day, being a day of the term of said Court, to wit: the March Term, A. D. 1875, and then and there to show cause, if any they have, why said final account shall not be settled, allowed and approved.

And whereas said account is for final settlement, and it duly appearing that said estate is ready for distribution, and that upon confirmation of said final account, distribution and partition of all said estate to all persons entitled thereto has been duly demanded.

It is further ordered, that all persons interested in said estate, be and appear before said Court, at the time and place aforesaid, without further notice or proceeding therefor, and then and there show cause, if any they have, why distribution of the residue of said estate should not be made among the heirs at law of said deceased, according to law and the respective rights of all the parties; and also, at the same place, immediately after decree of distribution of said estate is made, without further notice, to show cause why said Court shall not make an order appointing commissioners, or a commissioner, as it may seem best, to make partition and division of said estate among the heirs at law of said deceased, according to the respective rights of the parties and the decree of distribution, and to set aside to each his and her share, according to the proportions decreed to him, her, or them, or to report his or their inability to make partition of the whole or certain part or parts of said estate without sale, or without

prejudice or inconvenience, or as the case may be, and also to report and find the true value of all said real estate belonging to said estate.

And it is further ordered, that notice of the foregoing be given by publication, and that a copy hereof be published once a week for four successive weeks, before said 23d day of March, A. D. 1875, in the *Daily Examiner*, a daily newspaper printed and published in said city and county.

Dated this 18th day of February, A. D. 1875.

M. H. MYRICK, *Probate Judge.*

Endorsed: Order directing publication of notice, etc.
Filed February 18, 1875.

WM. HARNEY, *Clerk.*
By A. J. JEGHERS, *Dep'y Clerk.*

"EXHIBIT C."

In the Probate Court of the City and County of San Francisco.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED.

Whereas Chas. H. Sawyer, a competent attorney at law, has hitherto represented Horace Hawes and Caroline C. Hawes, minors, heirs of said deceased.

It is now by the Court here ordered that said Chas. H. Sawyer, an attorney at law and of this Court, be and is hereby appointed to represent said minors, Horace Hawes and Caroline C. Hawes, in the partition and distribution of said estate and all other proceedings where all of the parties in said estate or said heirs are required to be notified thereof.

Done in open Court this 29th day of March, 1875.

M. H. MYRICK, *Probate Judge.*

Endorsed: Order appointing attorney for minor heirs.
Filed March 29th, 1875.

WM. HARNEY, *Clerk.*
By A. J. JEGHERS, *Dep. Clk.*

"EXHIBIT D."

In the Probate Court Court of the City and County of San Francisco, State of California.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED.

Decree of Distribution.

The petition of Caroline Hawes, the administratrix, and heir at

law of the estate of Horace Hawes, deceased, for distribution and partition of said estate among the persons entitled thereto, coming on regularly to be heard the 29th day of March, 1875, and it duly appearing to the satisfaction of the Court, that due and *sufficient notice of the time and place* of hearing said petition had been duly given, as required by law, prior to the day set for hearing said matter; and that all State, City and County and Municipal Taxes, legally levied against said estate have been fully paid.

J. C. Bates, appearing on behalf of said administratrix, and Chas. H. Sawyer, Esq., on behalf of Horace Hawes and Caroline C. Hawes, the children of said deceased and his only descendants.

And it duly appearing to the satisfaction of said Court, that the property remaining in the hands of said administratrix for distribution consists entirely of real estate, and the final account of said administratrix having been this day duly settled by this Court, and said estate being in a proper condition for distribution and partition, and to be finally closed; and it also duly appearing to the satisfaction of the Court and it so finds the fact to be that certain portions of the property hereinafter described was and is common property, to-wit; Mission Block, No. 44, bounded by Ninth and Tenth, Bryant and Harrison streets, and the south-easterly part of Mission Block, No. 8, bounded by Folsom, Tenth, Harrison and Juniper alley, less School Lot, 68 9-12x137½ feet, and all the rest and residue of said estate was separate property.

That since the rendition of said final account the sum of $110.00 has come into the hands of said administratrix, and the sum of $200.00 has been expended by said administratrix, in paying necessary expenses of administration, and said amount so expended are hereby approved by this Court.

That a statement of the receipts and disbursements of said administratrix, since the rendition of her final account, on the said 18th day of February, A. D. 1875, was duly reported and filed at the time of making this distribution, together with an estimate of the expenses of closing said estate, to-wit: the sum of $1000.

That said Caroline Hawes, widow of said deceased, and Horace Hawes and Caroline C. Hawes, only children and descendants of said deceased, are the only heirs at law, and are entitled to share in the distribution of said estate.

That said Caroline Hawes, widow of deceased, is entitled to an one-half, undivided, of said common property of said deceased, and one-third (⅓) undivided of the rest of the estate and property of said deceased, and said children, Horace Hawes and Caroline C. Hawes; to the other one-half undivided of said common property, and to two-thirds undivided of the remaining property of said deceased.

And all and singular, the law and the premises, being by the Court here seen, heard, understood and fully considered.

Whereupon, It is now here ordered, adjudged and decreed, that all the acts and proceedings of said administratrix, appearing upon the records of this estate, be and the same are hereby approved and confirmed, and that all the rest and residue of the estate of said de-

ceased, hereinafter described, be and the same is hereby distributed as follows, to-wit: One undivided half of said Mission Block, No. 44, bounded by Ninth, Tenth, Harrison and Bryant streets, and the south-easterly part of Mission Block, No. 8, bounded by Folsom, Tenth, Harrison and Juniper streets, less said School Lot, to said Caroline Hawes, and the remaining or other half undivided to said Horace Hawes and Caroline C. Hawes. One undivided third part of Mission Block, No. 2, bounded by Ninth, Tenth, Folsom and Howard streets, and one-third (⅓) undivided of Fifty Vara Lot, No. 205, at the south-westerly corner of Pine and Sansome streets, and one-third (⅓) undivided of all the real estate in San Mateo county and hereinafter described, to said Caroline Hawes, and the remaining two-thirds thereof undivided to said Horace Hawes and Caroline C. Hawes, share and share alike between them.

That is to say, the said Caroline Hawes, widow of said deceased, is entitled to and does hereby receive an undivided one-half of the said common property of the said decedent, and said Horace Hawes an undivided one-quarter of said common property and an undivided one-third of the rest and residue of said property or estate; and the said Caroline C. Hawes an equal undivided one-fourth (¼) of said common property and an equal one-third (⅓) undivided in the other property of said decedent.

The following is a more particular description of the residue of said real estate above referred to in this decree, of which distribution is ordered, adjudged and decreed as aforesaid.

FIRST.

All that certain lot or block of land situate in the City and County of San Francisco, State of California, designated and known on the official map of said city and county as Mission Block No. Forty-four (44), bounded by Ninth, Bryant, Tenth and Harrison streets.

SECOND.

All that certain piece and parcel of land in said city and county described as follows, to-wit:

Commencing at the south-westerly corner of Folsom and Tenth streets, thence south-easterly along the westerly line of Tenth street five hundred and fifty (550) feet; thence at right angles south-westerly along northerly line of Harrison street one hundred and thirty-six (136) 3-12 feet; thence at right angles north-westerly one hundred and thirty-seven (137) feet and six inches; thence at right angles south-westerly sixty-eight (68) feet and nine (9) inches; thence at right angles north-westerly four hundred and twelve (412) feet and six inches to Folsom street; and thence at right angles north-easterly along the southerly line of Folsom street two hundred and five (205) feet to the point of beginning, the same being a part of Mission Block No. 8, as designated on the official map of said city and county.

THIRD.

All that certain lot and block of land in said City and County of San Francisco designated and known on the official map thereof as Mission Block number two (2), bounded by Folsom, Howard, Ninth and Tenth streets.

FOURTH.

All that lot of land one hundred and thirty-seven (137) feet and six inches square in the said City and County of San Francisco, at the south-west corner of Pine and Sansome streets, designated and known on the official map as Fifty vara lot number two-hundred and five (205).

FIFTH.

All that certain farm or tract of land situate in the County of San Mateo, State of California, adjoining the town of Redwood City, called "Redwood Farm," and which is more particularly bounded and described as follows: Commencing at a point marked by a block of granite about three feet and a-half long, thirteen inches wide and eight (8) inches thick, more or less, and placed in the ground perpendicularly so as to leave the top a little below the surface or even with it, and situated in the south-westerly line of the County Road leading from San Francisco to San Jose, at its intersection with the southerly line of the road known as the "Whipple Road," as the same is now traveled, and being the road, forty chains in length of which was dedicated to public use, pursuant to the covenants in a certain deed made and executed by Soledad Ortega de Arguello, Jose Ramon Arguello, and Louis Antonio Arguello, bearing date the twenty-second day of October, 1851, and recorded in the office of the Recorder of San Francisco county, in Liber No. 12 of Deeds, page 353; the said point of beginning bearing south forty-three degrees east (S. 43 deg. E.) one (1) chain from the north-east corner of the Engert Tract; thence running along the south-westerly line of the said County Road south forty-three degrees east (S. 43 deg. E.) forty-two chains and seventy-two links, (42. 72 chs.) to a point marked by a block of granite six feet and six inches in length, one foot wide and eight inches thick, more or less, placed perpendicularly in the ground about one-half its length below and one-half above the surface, and situated in an angle of the southerly line of the aforesaid County Road; thence along the south-westerly line of the said County Road south forty-eight degrees and thirty min. east (S. 48 deg. 30 min. E) seventy chains and seventy-three links (70. 73 chs.) to a point marked by a block of granite six feet and six inches in length, twelve inches wide and eight inches thick, more or less, placed perpendicularly in the ground about one-half its length below and one-half above the surface, and situated in the south-westerly line of the said County Road; thence south forty-four degrees and thirty minutes, west (S. 44 deg. 30 min. W) one-hundred and fifteen chains (115 ch.) to an oak sapling blazed and standing on the southerly bank of the Arroyo del Ojo de Agua, from which a large live oak tree marked B. T.

bears north eighteen degrees west (N. 18 deg. W) distant thirty-six links (36-100 chs.); thence following up the center of the Arroyo del Ojo de Agua and the meanderings thereof to a bay tree marked X. standing on the southerly bank of said Arroyo and on the westerly line of Owen McGarvey's lot, the said bay tree bearing south forty-four degrees and forty-five minutes west (S. 44 deg. 45 min. W) and distant twenty-nine chains and seven links (29. 07 chs.) from the aforesaid oak sapling on said Arroyo; thence south forty-four degrees and thirty minutes west (S. 44 deg. 30 min. W) along the westerly line of said McGarvey's lot, thirty-five chains and eighty-nine links (35. 89 chs.) to an oak stake marked H. H., from which an oak tree marked B. T. bears south twenty-four degrees and thirty minutes east (S. 24 deg. 30 min. E.) distant twenty-five links (25-100 chs.); thence at right angles north forty-five degrees and thirty minutes west (N. 45 deg. 30 min. W.) one hundred and thirteen chains and thirty-one links (113. 31 chs.) to an oak tree twelve inches in diameter marked H. H.; thence north forty-four degrees and thirty minutes east (N. 44 deg. 30 min.) one hundred and seventy-eight chains and twelve links (178. 12 chs.) to the aforesaid described point of beginning; the above courses having reference to the true meridian, the variations of the magnetic meridian being fifteen degrees and seventeen minutes east (15 deg. and 17 min. E.); containing nineteen hundred and twenty-nine (1929) and 78-100 acres, according to late survey thereof by the County Surveyor of San Mateo County.

SIXTH.

All those lots situated in Redwood City, San Mateo county, designated and known on the official map of said Redwood City and within the limits thereof as "Villa Lots" Nos. Thirteen (13) and Fourteen (14).

Done in Open Court, this twenty-ninth (29th) day of March, A. D. 1875.

M. H. MYRICK, *Probate Judge.*

"EXHIBIT E."

In the Probate Court of the City and County of San Francisco

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED.

The petition of Caroline Hawes, administratrix and heir at law of the estate of Horace Hawes, deceased, for partition of said estate, according to law, coming on regularly to be heard this twenty-ninth day of March, A. D. 1875, immediately after the decree distributing said estate being made. J. C. Bates appearing for said petitioner, and Chas. H. Sawyer, Esq., appearing for and representing Horace Hawes and Caroline C. Hawes, minor heirs of said deceased, and

THIRD.

All that certain lot and block of land in said City and County of San Francisco designated and known on the official map thereof as Mission Block number two (2), bounded by Folsom, Howard, Ninth and Tenth streets.

FOURTH.

All that lot of land one hundred and thirty-seven (137) feet and six inches square in the said City and County of San Francisco, at the south-west corner of Pine and Sansome streets, designated and known on the official map as Fifty vara lot number two-hundred and five (205).

FIFTH.

All that certain farm or tract of land situate in the County of San Mateo, State of California, adjoining the town of Redwood City, called "Redwood Farm," and which is more particularly bounded and described as follows: Commencing at a point marked by a block of granite about three feet and a-half long, thirteen inches wide and eight (8) inches thick, more or less, and placed in the ground perpendicularly so as to leave the top a little below the surface or even with it, and situated in the south-westerly line of the County Road leading from San Francisco to San Jose, at its intersection with the southerly line of the road known as the "Whipple Road," as the same is now traveled, and being the road, forty chains in length of which was dedicated to public use, pursuant to the covenants in a certain deed made and executed by Soledad Ortega de Arguello, Jose Ramon Arguello, and Louis Antonio Arguello, bearing date the twenty-second day of October, 1851, and recorded in the office of the Recorder of San Francisco county, in Liber No. 12 of Deeds, page 353; the said point of beginning bearing south forty-three degrees east (S. 43 deg. E.) one (1) chain from the north-east corner of the Engert Tract; thence running along the south-westerly line of the said County Road south forty-three degrees east (S. 43 deg. E.) forty-two chains and seventy-two links, (42. 72 chs.) to a point marked by a block of granite six feet and six inches in length, one foot wide and eight inches thick, more or less, placed perpendicularly in the ground about one-half its length below and one-half above the surface, and situated in an angle of the southerly line of the aforesaid County Road; thence along the south-westerly line of the said County Road south forty-eight degrees and thirty min. east (S. 48 deg. 30 min. E) seventy chains and seventy-three links (70. 73 chs.) to a point marked by a block of granite six feet and six inches in length, twelve inches wide and eight inches thick, more or less, placed perpendicularly in the ground about one-half its length below and one-half above the surface, and situated in the south-westerly line of the said County Road; thence south forty-four degrees and thirty minutes, west (S. 44 deg. 30 min. W) one-hundred and fifteen chains (115 ch.) to an oak sapling blazed and standing on the southerly bank of the Arroyo del Ojo de Agua, from which a large live oak tree marked B. T.

bears north eighteen degrees west (N. 18 deg. W) distant thirty-six links (36-100 chs.); thence following up the center of the Arroyo del Ojo de Agua and the meanderings thereof to a bay tree marked X. standing on the southerly bank of said Arroyo and on the westerly line of Owen McGarvey's lot, the said bay tree bearing south forty-four degrees and forty-five minutes west (S. 44 deg. 45 min. W) and distant twenty-nine chains and seven links (29. 07 chs.) from the aforesaid oak sapling on said Arroyo; thence south forty-four degrees and thirty minutes west (S. 44 deg. 30 min. W) along the westerly line of said McGarvey's lot, thirty-five chains and eighty-nine links (35. 89 chs.) to an oak stake marked H. H., from which an oak tree marked B. T. bears south twenty-four degrees aud thirty minutes east (S. 24 deg. 30 min. E.) distant twenty-five links (25-100 chs.); thence at right angles north forty-five degrees and thirty minutes west (N. 45 deg. 30 min. W.) one hundred and thirteen chains and thirty-one links (113. 31 chs.) to an oak tree twelve inches in diameter marked H. H.; thence north forty-four degrees and thirty minutes east (N. 44 deg. 30 min.) one hundred and seventy-eight chains and twelve links (178. 12 chs.) to the aforesaid described point of beginning; the above courses having reference to the true meridian, the variations of the magnetic meridian being fifteen degrees and seventeen minutes east (15 deg. and 17 min. E.); containing nineteen hundred and twenty-nine (1929) and 78-100 acres, according to late survey thereof by the County Surveyor of San Mateo County.

SIXTH.

All those lots situated in Redwood City, San Mateo county, designated and known on the official map of said Redwood City and within the limits thereof as "Villa Lots" Nos. Thirteen (13) and Fourteen (14).

Done in Open Court, this twenty-ninth (29th) day of March, A. D. 1875.

M. H. MYRICK, *Probate Judge.*

"EXHIBIT E."

In the Probate Court of the City and County of San Francisco

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED.

The petition of Caroline Hawes, administratrix and heir at law of the estate of Horace Hawes, deceased, for partition of said estate, according to law, coming on regularly to be heard this twenty-ninth day of March, A. D. 1875, immediately after the decree distributing said estate being made. J. C. Bates appearing for said petitioner, and Chas. H. Sawyer, Esq., appearing for and representing Horace Hawes and Caroline C. Hawes, minor heirs of said deceased, and

upon consent in open Court of all parties interested to the appointment of James L King, sole commissioner for the purposes of partition and division of the estate of said deceased.

And said Court deeming it just and proper that said James L. King be appointed sole commissioner for such purposes and all and singular, the law and the premises being by the Court here seen, heard, understood and fully considered.

Whereupon, it is now by the Court here ordered, adjudged and decreed that partition and division of said real estate, described in the decree of distribution herein be made in accordance with the rights of the parties as determined by said decree of distribution.

And it is further ordered that the said James L. King be and he is hereby appointed sole commisssoner for that purpose, and whose duty it shall be to make partition and division of said real estate described in said decree of distribution, in accordance with the rights and interests of respective parties as therein determined, and make report of his proceedings and partition in writing to this Court.

Done in open Court this twenty-ninth day of March, A. D. 1875.

M. H. MYRICK, *Probate Judge.*

Endorsed: Decree of partition and order appointing commissioner for such purpose.

Filed March 29th, 1875.

WM. HARNEY, *Clerk.*
By A. J. JEGHERS, *Deputy Clerk.*

"EXHIBIT F."

In the Probate Court of the City and County of San Francisco.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED

To Chas. H. Sawyer, Esq., attorney for Horace Hawes and Caroline C. Hawes, minor heirs of said deceased, and J. C. Bates, attorney for Caroline Hawes, widow of said deceased and administratrix of said estate.

You and each of you will please take notice that I, James L. King, duly appointed and qualified commissioner, to make partition and division of the residue of the estate of Horace Hawes, deceased, in accordance with the decrees and orders of said Probate Court, duly made the twenty-ninth day of March, A. D. 1875, in said estate, will on Thursday, the 8th day of April, A. D. 1875, at my office No. 442 California street, in the City and County of San Francisco, proceed to and make partition of the property described in the decree of distribution in said estate, in accordance with the rights of respective parties as therein determined.

JAMES L. KING, *Commissioner.*

San Francisco, April 2nd, 1875.

Endorsed: Notice of time and place of making partition.

We hereby acknowledge service and receipt of a copy hereof, this 2nd day of April, A. D. 1875.

CHARLES H. SAWYER,

Attorney for Horace Hawes and Caroline C. Hawes minors, heirs of said deceased.

J. C. BATES,

Attorney for Caroline Hawes, widow of said deceased, and administratrix of said estate.

"EXHIBIT G."

In the Probate Court of the City and County of San Francisco.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED.

Report of Commissioner in Petition and Division.

To the Hon. the Probate Court of the City and County of San Francisco, State of California:

The undersigned duly appointed by the order of said Court, sole commissioner to make partition and division of the estate of Horace Hawes, deceased, among the persons entitled hereby, makes and submits to this Hon. Court the following report:

1st. That prior to proceeding to make partition and division of the estate of said deceased, to-wit: on the 2nd day of April, A. D. 1875, your commissioner took and subscribed the oath required by, and in accordance with law, which said oath was duly endorsed on a certified copy of the decree distributing said estate, and also on the decree of partition and order appointing the undersigned commissioner in said estate for such purpose.

2nd. That before making division, I viewed and examined all the real estate described in said decree of distribution, a full, true and correct copy of which decree is hereto annexed, made a part hereof and marked "Exhibit A."

3d. That a correct survey by the County Surveyor of the County of San Mateo County was made of the ranch or tract of land situate in said county in front of Redwood City. A copy of which is hereto attached and made a part hereof and marked "Exhibits B and C."

4th. That correct diagrams of the lots and blocks belonging to said estate in said City and County of San Francisco, are hereto annexed and made a part hereof and marked "Exhibits D, E, F."

5th. That prior to proceeding and making partition of said estate due notice in writing was given by the undersigned commissioner to all the parties in interest, represented by their proper and lawful attorneys. A copy of which notice together with the proofs of service thereof endorsed thereon, is hereto annexed and marked "Exhibit G."

6th. That at the time and place in said notice marked "Exhibit G" mentioned, your commissioner was attended by all the parties

interested in said estate, to-wit: Chas. H. Sawyer, attorney for Horace Hawes and Caroline C. Hawes, minor heirs of said deceased, and J. C. Bates, attorney for Caroline Hawes, widow of said deceased.

7th. That after a thorough examination of the premises, and a full consideration of the rights of the respective parties as determined by said decree of distribution of March 29th, A. D. 1875, I proceeded to and did make partition and division of the property described in said decree of distribution, according to the rights of each as therein determined.

The estate in each county being divided separately among all the heirs of said deceased as if there was no other estate to be divided. And that the following is the division a nd partition of the real estate made by your commissioner.

FIRST.

All the land in the County of San Mateo described in the fifth and sixth divisions of the property in said decree of distribution is divided and partitioned so as to give each one one-third (⅓) in the value thereof, and the parts belonging to each with the number acres therein is fully set forth in the said "Exhibit C," hereto annexed which is hereby referred to for a description of the share belonging to each; the said Caroline Hawes, widow, receiving for herself said "Villa Lots, Nos. 13 and 14, set forth in "Exhibit B."

SECOND.

Mission Block, No. fourty-four (44) bounded by Ninth, Tenth Harrison and Bryant streets, in the City and County of San Francisco, described in first division of the property in said decree is hereby divided and partitioned in three parts as follows, to-wit:

The south-easterly half of said block to said Caroline Hawes, being the half fronting on Bryant street, and the north-westerly half to said children, Horace Hawes and Caroline C. Hawes, in equal shares. Said Caroline C. Hawes receiving one-quarter (¼) of the block fronting 275 feet on Ninth street, and 205 feet on Harrison street; and to Horace Hawes receiving the one-quarter (¼) of said block fronting 275 feet on Tenth street, and 205 feet on Harrison street as described in the said plot thereof, hereto annexed and marked "Exhibit D," which is hereof referred to for further description.

THIRD.

All that part of Mission Block, No. 8, in said City and County, described in the second division of property in said decree of distribution to Caroline Hawes, widow of said deceased.

FOURTH.

All that certain lot and block of land in said City and County, bounded by Ninth, Tenth, Howard and Folsom streets, and designated and known on the official map of said city and county as Mission Block No. two, (2), equally between said children of Horace

Hawes and Caroline C. Hawes, by a line running through said block from Ninth to Tenth streets, parallel with Howard and Folsom streets, and equal distance therefrom. Giving and allotting to Caroline C. Hawes the south-easterly half thereof, fronting on Folsom street; and to Horace Hawes the other half fronting on Howard street, as indicated by the diagram or plat thereof, hereto annexed and marked "Exhibit E."

FIFTH.

All that certain fifty vara lot in said city and county, 137½ feet square, at the south-westerly corner of Pine and Sansome streets, designated on the official map of said city and county as Fifty Vara Lot 205, to the said Caroline Hawes, widow of said deceased.

And your commissioner therefore does so divide and partition said real estate as herein before indicated, to the respective parties, and respectfully submits that all the rights of the respective parties being considered, requires this report to be approved and confirmed by this Hon. Court.

JAMES L. KING, *Commissioner.*

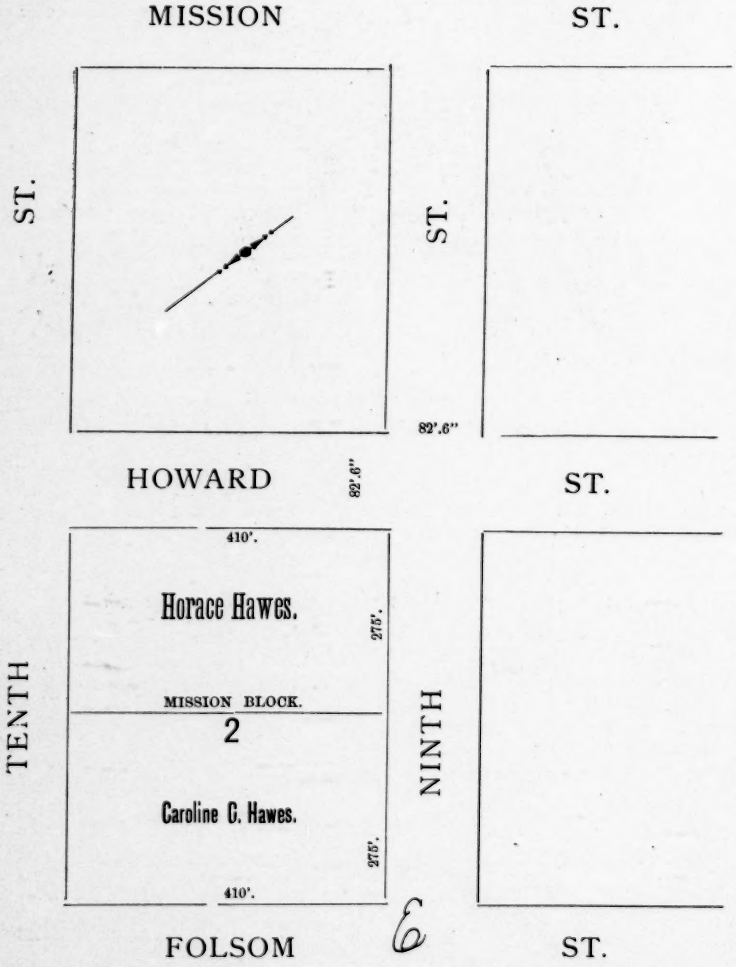
April 13th, 1875.

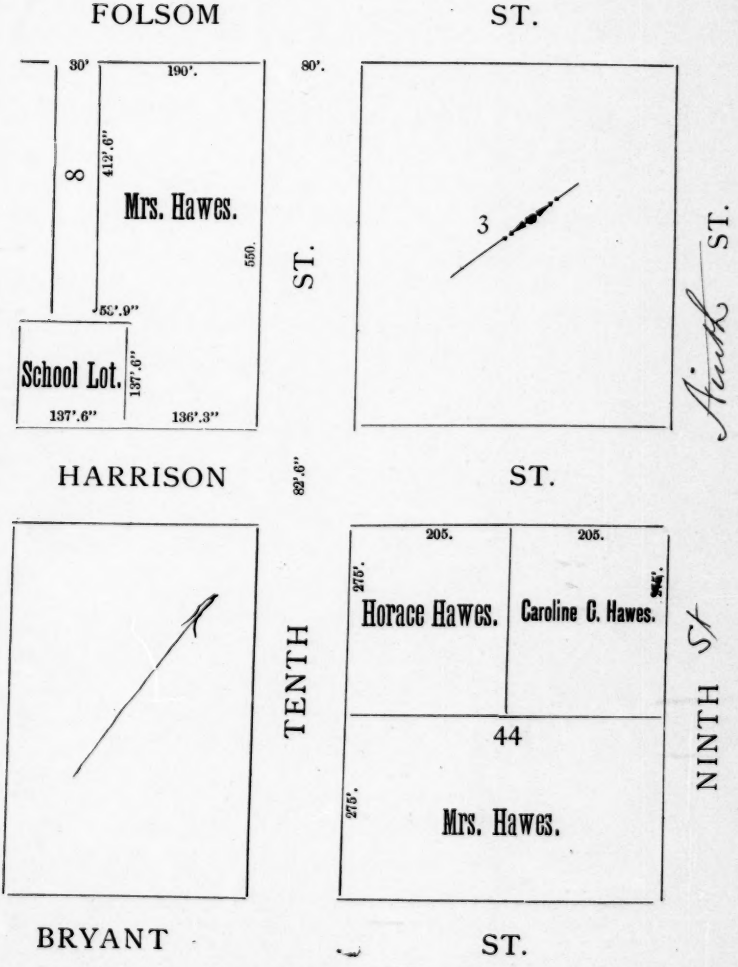
Hereto attached certified copies of decree of distribution and decree of partition and order appointing commissioner, (same as "Exhibits C. and D.") with oath endorsed on same.

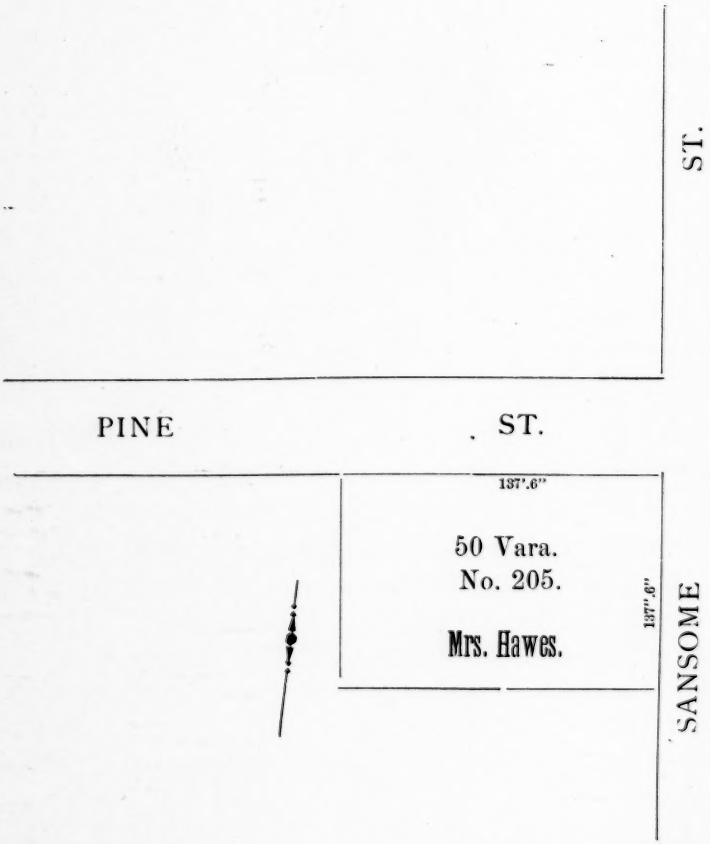
"Exhibit A" of this report same as "Exhibit C."
"Exhibits B and C" being survey of ranch in San Mateo County.
"Exhibits D, E, F" being diagrams of city property.
"Exhibit G" being same notice marked "Exhibit F."

[Endorsed]: Report of commissioner in partition and division.
Filed April 13th, 1875.

WM. HARNEY, *Clerk.*
By A. J. JEGHERS, *Deputy Clerk.*


MISSION
ST.
ST.
ST.
82'.6"
HOWARD
82'.6"
ST.
410'.
Horace Hawes.
275'.
MISSION BLOCK.
2
Caroline C. Hawes.
275'.
410'.
TENTH
NINTH
FOLSOM
ST.


FOLSOM
ST.
30'
190'.
80'.
412'.6"
8
Mrs. Hawes.
550.
ST.
3
55'.9"
School Lot.
137'.6"
137'.6"
136'.3"
Fourth ST.
HARRISON
82'.6"
ST.
TENTH
205.
205.
275'.
Horace Hawes.
Caroline C. Hawes.
NINTH St
44
275'.
Mrs. Hawes.
BRYANT
ST.


ST.
PINE
ST.
137'.6"
50 Vara.
No. 205.
Mrs. Hawes.
137'.6"
SANSOME

"EXHIBIT H."

In the Probate Court of the City and County of San Francisco, State of California.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED. } Order confirming report of commissioner, and decree of partition thereon.

James L. King, duly appointed by consent of all parties in interest on the 29th day of March, A. D. 1875, sole commissioner to divide and partition the estate of said deceased among the heirs entitled thereto, having on the 13th day of April, A. D. 1875, duly presented to and filed in this Court the report of his proceedings, and the matter coming on regularly to be heard this 19th day of April, A. D. 1875; J. C. Bates appearing for Caroline Hawes, and Chas. H. Sawyer, Esq., the attorney appointed to represent Horace Hawes and Caroline C. Hawes, appearing on their behalf, and it duly appearing to the satisfaction of said Court that Jas. L. King duly qualified as such commissioner as required by law and duly performed all his duties, and gave notice to all parties interested, in all respects as prescribed by the statute in such cases, and in conformity with the rights of the respective parties, as determined by the decree of distribution, and all and singular the law and the premises being by the Court here *seen, heard, understood and fully considered.*

Whereupon it is by the Court here ordered, adjudged and decreed that said report of said commissioner be, and the same is hereby confirmed, and the division and partition of said estate adjudged valid between the parties therein mentioned.

And it is further adjudged, decreed and determined that the following is a correct description of the respective parts or parcels of said estate assigned to each of the said parties entitled, by said commissioner's report and by this Court, as follows, to wit:

FIRST.

TO CAROLINE HAWES.

All that certain part of that tract of land, situated in the County of San Mateo, State of California, adjoining the town of Redwood City, called "Redwood Farm," and which said part is more particularly bounded and described as follows: Commencing at a point marked by a block of granite about three feet and a-half long, thirteen inches wide and eight inches thick, more or less, and placed in the ground perpendicularly so as to leave the top a little below the surface or even with it, and situated in the southwesterly line of the County Road leading from San Francisco to San Jose, at its intersection with the southerly line of the road known as the "Whipple Road," as the same is now traveled, and being the road, forty chains in length of which was dedicated to public use, pursuant to

the covenants in a certain deed made and executed by Soledad Ortega de Arguello, Josè Ramon Arguello and Louis Antonio Arguello bearing date the twenty-second day of October, 1851, and recorded in the office of the Recorder of San Francisco county, in Liber No. 12 of Deeds, page 353; the said point of beginning bearing south forty-three degrees east (S. 43 deg. E.) one (1) chain from the northeast corner of the Engert Tract; thence running southwesterly along said Whipple Road and the northwesterly line of said ranch one hundred sixty-nine chains and sixty-four links (169.64 chs.), a little more or less to an oak tree, marked H H, in the westerly corner of said "Redwood Farm;" thence at right angles southeasterly and along the southwesterly or back line of said farm thirty-five chains and sixty-five links (35.65 chs.); thence at right angles northeasterly and parallel with the northwesterly line of said farm and said Whipple Road one hundred and sixty-nine chains and ninety-eight links, (169.98 chs.), a little more or less, to said County Road; and thence north-westerly along the line of said County Road thirty-five chains and sixty-eight links (35.68 chs.) to the point of beginning, containing six hundred and five acres, more or less.

And also, Villa Lots Nos. thirteen and fourteen (13 & 14) in Redwood City, San Mateo County, fronting on A street and said County Road.

Also, that certain lot of land situate in the City and County of San Francisco, State of California, described as follows, to-wit: Commencing at the north-westerly corner of Bryant and Ninth streets; thence north-westerly along the westerly line of said Ninth street, two-hundred and seventy-five (275) feet; and thence at right angles south-westerly and parallel with Bryant street four hundred and ten (410) feet, to easterly line of Tenth street; thence south-easterly and along the easterly line of said Tenth street, two-hundred and seventy-five (275) feet; and thence at right angles north-easterly and along the northerly line of said Bryant street, four hundred and ten (410) feet, to the point of beginning—the same being the south-easterly half of Mission Block No. forty-four (44) according to the official map of the City and County of San Francisco.

Also, all that certain piece and parcel of land in said City and County of San Francisco described as follows, to-wit: Commencing at the south-westerly corner of Folsom and Tenth streets, thence south-easterly along the westerly line of Tenth street five hundred and fifty (550) feet: thence at right angles south-westerly along northerly line of Harrison street one hundred and thirty-six (136) 3-12 feet; thence at right angles north-westerly one hundred and thirty-seven (137) feet and six inches thence at right angles south-westerly sixty-eight (68) feet and nine (9) inches; thence at right angles north-westerly four hundred and twelve (412) feet and six inches to Folsom street; and thence at right angles north-easterly along the southerly line of Folsom street two hundred and five (205) feet to the point of beginning, the same being a part of Mission Block, No. 8, as designated on the official map of said city and county.

And also, all that lot of land one hundred and thirty-seven (137) feet and six inches square, situate in said City and County of San

Francisco, at the south-west corner of Pine and Sansome streets, designated and known on the official map as Fifty vara Lot number two hundred and five (205).

All the foregoing described parcels of land being allotted and assigned to said Caroline Hawes, for her own separate use and benefit.

SECOND.

To Caroline C. Hawes.

All that certain part of said "Redwood Farm," in said County of San Mateo, described as follows, to-wit: Commencing at a point in the south-westerly line of said County Road distant south-easterly thirty-five chains and sixty-eight links (35.68 chs.) from the above described granite block at the northerly corner of said "Redwood Farm;" thence south-westerly parellel with said Whipple Road and said north-westerly line of said farm, and along the south-easterly line of said Caroline Hawes' part of said farm, as above described, one hundred sixty-seven chains and ninety-eight links (167.98 chs.) a little more or less, to the back or south-westerly line of said farm; thence at right-angles south-easterly along the said back line of said farm forty chains and forty-eight links (40.48 chs.); thence at right angles north-easterly and parallel with division line above named to said County Road; and thence north-westerly along said County Road forty chains and fifty-three links (40.53 chs.) to the point of beginning. Containing six hundred eighty-one (681) acres, a little more or less.

Also, all that certain part of Mission Block No. 44, situate in the City and County of San Francisco, and described as follows, to-wit: Commencing at the south-westerly corner of Harrison and Ninth streets; thence south-westerly along said Harrison street two hundred and five (205) feet; thence at right angles south-easterly two hundred seventy-five (275) feet; and thence at right angles north-easterly two hundred and five (205) feet to Ninth street; and thence north-westerly along said line of Ninth street two hundred seventy-five (275) feet to the point of the beginning.

And also, that certain lot of land in said city and county, described as follows, to-wit: Commencing at the north-westerly corner of Folsom and Ninth streets; thence south-westerly along the line of Folsom street four hundred and ten (410) feet to Tenth street; thence at right angles north-westerly along Tenth street two hundred seventy-five(275) feet; thence at right angles and parellel with Folsom street four hundred and ten (410) feet to Ninth street; and thence south-easterly along said Ninth street two hundred seventy (275) feet to the point of beginning, the same being the south easterly half of Mission Block No. 2, on the official map of said city and county.

The land described in the "second" division, being allotted and assigned to said Caroline C. Hawes for her sole use and benefit.

THIRD.

To Horace Hawes.

All that certain part of said "Redwood Farm," situate in said county of San Mateo, and described as follows, to-wit: Commencing at a point on the south-westerly line of said County Road, distant south-easterly seventy-six chains and twenty-one links (76.21 chs.) from the above described granite block at the northerly corner of said farm; thence south-westerly and along the south-easterly division line of said Caroline C. Hawes, one hundred sixty-nine chains and seventy-four links (169.74 chs.) a little more or less, to the back line of said farm; and thence at right angles south-easterly, and along the back line of said farm, thirty-seven chains and fifty-two links (37.52 chs.), to a granite block situate at the southerly corner of said farm; thence at right angles north-easterly and along the boundary line of the south-easterly line of said ranch, as described in the decree of distribution herein, dated March 29th, 1875, to the westerly line of the Woodside road; thence northerly along said westerly line of said Woodside road as now traveled, nine chains, a little more or less, to said County Road; thence north-westerly along said line of said County Road to the beginning. Containing six hundred forty-eight (648) acres, a little more or less.

Also, all that certain parcel of land in the City and County of an Francisco, bounded and described as follows, to-wit: Commencing at the south-easterly corner of Tenth and Harrison streets; and thence south-easterly along the easterly line of Tenth street, two hundred seventy-five (275) feet; thence at right angles north-easterly two hundred and five (205) feet; and thence at right angles north-westerly two hundred seventy-five (275) feet to Harrison street; and thence south-westerly along Harrison street two hundred and five (205) feet to point of commencement, the same being a part of Mission Block No. 44, as designated on the official map of said city and county.

And also, all that certain lot of land in said city and county, described as follows, to-wit; Commencing at the south-westerly corner of Howard and Ninth streets; thence south-westerly along said line of Howard street four hundred and ten (410) feet to Tenth street; and thence south-easterly along Tenth street two hundred and seventy-five (275) feet; and thence at right angles north-easterly and parallel with Howard street four hundred and ten (410) feet to Ninth street; and thence north-westerly along said Ninth street two hundred and seventy-five (275) feet to the point of beginning, being the north-westerly half of Mission Block No. 2, as laid down on the official map of said city and county.

The land described in the third and last division being assigned and set apart to Horace Hawes, for his own separate use and benefit forever.

And it is further adjudged, decreed and determined that as between said parties, without prejudice to rights of persons not parties to this suit, the title to all lands embraced in first divi-

sion, vests in Caroline Hawes; in second division in Caroline C. Hawes; in third division in Horace Hawes.

Done in Open Court, April 19th, A. D. 1875.

M. H. MYRICK, *Probate Judge.*

[Endorsed:] No. 4240.

Order confirming report of commissioner in partition and decree of partition made thereon.

Filed April 19, 1875.

WM. HARNEY, *Clerk.*
By A. F. JEGHERS, *Deputy Clerk.*

"Exhibit I."

This Indenture, made the twenty-fourth day of May, in the year of Our Lord, one thousand eight hundred and seventy-five (1875,) between Caroline Hawes, widow, and relict of Horace Hawes, deceased, of the City and County of San Francisco, State of California, the party of the first part, and James C. Flood, of the same place, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of three hundred thousand ($300,000) dollars, in gold coin of the United States of America, to her in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors and administrators, forever released and discharged thereupon, by these presents, has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece or parcel of land, situate lying and being in the City and County of San Francisco, State of California, bounded and particularly described as follows, to-wit: Commencing at the corner formed by the intersection of the southerly line of Pine street with the westerly line of Sansome street; running thence westerly along said southerly line of Pine street one hundred and thirty-seven and one-half (137½) feet; thence at right angles southerly and parallel with Sansome street one hundred and thirty-seven and one-half (137½) feet; thence at right angles easterly and parallel with Pine street one hundred and thirty-seven and one-half (137½) feet to the westerly line of Sansome street; and thence at right angles northerly and along said westerly line of Sansome street one hundred and thirty-seven and one-half (137½) feet to the southerly line of Pine street and the point of commencement.

Being all of fifty vara lot number two hundred and five (205) as laid down and designated upon the official map of said city and county of San Francisco, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the es-

tate, right, title interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises, and every part and parcel thereof, with their appurtenances. To have and to hold all and singular the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever.

And the said party of the first part, for herself and her heirs, executors and administrators, does hereby, covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said party of the first part, at the time of the sealing and delivery of these presents, was lawfully seized in her own right, of a good, absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the said premises with the appurtenances and has good right, full power and lawful authority, to grant, bargain, sell and convey the same in the manner aforesaid.

And that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, her heirs or assigns, or of any other person or persons lawfully claiming or to claim the same. And that the same now are free, clear, discharged and unencumbered, of and from all other and former grants, trusts, uses, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever.

And also, that the said party of the first part and her heirs and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the said premises, by, from, under or in trust for her or them, shall and will, at all time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required..

And the said party of the first part, for herself and her heirs, the said premises and every part and parcel thereof, with the appurtences, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and her heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend. Excepting, however, from said foregoing covenants, the leasehold interest of Jacob H. Blumenberg, in said lot of land, subject to which this conveyance is made.

In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

[sgd.] CAROLINE HAWES, [L. S.]

Signed, sealed and delivered in the presence of

[sgd.] J. C. BATES,

STATE OF CALIFORNIA }
City and County of San Francisco. } ss.

On this twenty-fourth day of May, A. D. one thousand eight hundred and seventy-five, before me, Palmer G. Wood, a Notary Public, in and for said city and county, duly commissioned and sworn, personally appeared Caroline Hawes, known to me to be the same person whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and fixed my official seal, at my office, in the City and County of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] [sgd.] PALMER G. WOOD, *Notary Public.*

Recorded in the office of the County Recorder, in the City and County of San Francisco, May 25th, 1875, at 39 minutes past 2 P. M. in Liber 788 of Deeds, page 345.

O. H. FRANK, *County Recorder.*
Per THOS. M. O'CONNOR, *Deputy.*

[Endorsed:] Caroline Hawes to James C. Flood, deed. Dated twenty-fourth May, 1875.

Recorded at the request of James C. Flood, May 25th, 1875, at 39 min. past 2 P. M., in Liber 788, of Deeds, page 345.

"EXHIBIT J."

Deed of Foundation and Chamber of Industry.

This Indenture, made this thirty-first day of October, in the year of Our Lord, one thousand eight hundred and seventy, between Horace Hawes, of the City and County of San Francisco, State of California, party of the first part, and Albert Dibblee, James De. Fremery, John Taylor, Horatio Stebbins, D. D. and Andrew S. Hallidie, also of said City and County, parties of the second part, *Witnesseth:*

That the said party of the first part, for the consideration, purpose and use declared in the trust herein created, doth, by these presents, give, grant and convey unto the said parties of the second part, their associates and successors to be appointed as hereinafter mentioned, all that certain lot or block of land, situated in the City and County of San Francisco, known and described on the

official map as Mission Block number forty-four, bounded by Harrison, Bryant, Ninth and Tenth Streets.

To have and to hold the above described and granted land unto the said parties of the second part, their said associates and successors, (without the power to sell, alienate or encumber the same or any part thereof, except as hereinafter provided,) *forever; in trust,* to use and occupy the said land, and apply the annual rents, issues and profits thereof, for the endowment, establishment and maintenance of a philanthropic institution, dedicated and directing all its operations to the *prevention of want by means of the protection of labor, and the promotion of useful industry;* which establishment shall be organized and maintained under the name of the Chamber of Industry, and, within ten years from the date hereof, shall be and remain located upon the above donated and granted land. It is hereby confided to and enjoined upon the said parties of the second part, the survivor or survivors of them, or such of them as may then reside or be in the State of California, that they do, after the expiration of two years, and within ten years from the time of the delivery of these presents, by and with the advice, concurrence and consent of the persons who, for the time being, shall be the Judges of the Supreme Court of the State of California, or a majority of them, appoint ten other persons, or such number as, with the number of said parties of the second part then living, will constitute fifteen in all; and the said appointment being made, and evidenced by deed duly acknowledged and recorded, as deeds of conveyance are by law required to be, the said above granted land, with the trust attached, shall thereupon vest in said fifteen persons, who, and their successors, to be appointed as hereinafter mentioned, shall constitute the Board of Trustees of said Chamber of Industry. The Board of Trustees of said Chamber of Industry shall consist of fifteen members, as aforesaid, until the expiration of thirty years from the date hereof; at and after which date, the said Board shall have power to increase their number to twenty-five by the appointment of new members, to be made by the Board itself. Both before and after such increase of numbers, vacancies in the Board of Trustees, which may occur by death, resignation, refusal to serve, incapacity, or from any cause, shall be filled by appointments to be made by the remaining members. The ordinances of the Chamber of Industry, established by the said Board of Trustees, shall define and determine what shall constitute incapacity to serve as a member of the said Board, and shall also prescribe the mode of assembling the Board, and the manner of conducting its sessions and proceedings. A quorum of the Board of Trustees shall consist of at least two-fifths of all the members, and for any act of the Board, except adjournment, the concurrence of at least five members and the majority of the members present, shall be requisite. Reasonable notice of the time and place for meetings of the Board shall be given. A record shall be kept of the vote of each member on all subjects acted on by the Board, except questions of adjournment from day to day. After the number of the Board of Trustees shall

have been increased to twenty-five, the said Board shall have power to appoint from among its members a chief executive officer of the Institution, with the title of Governor of the Chamber of Industry, to hold office during good behavior and the pleasure of the Board, who, either alone, or with the concurrence of two counselors to be named and chosen by the Board from among its members, shall exercise such of the powers of the Board as may be delegated to him by the ordinances of the Chamber of Industry. The services of the members of the Board of Trustees are to be *gratuitous*, and the acceptance of the office is to be deemed subject to that condition, but the Governor and Counselors shall receive such compensation as may be provided by the ordinances of the Chamber of Industry, the amount of such compensation being first approved by the persons then being the Judges of the Supreme or highest court of law in the State, or a majority of them.

The above-named grantees and parties of the second part, before the organization of the Board of Trustees, may exercise such of the powers herein granted to the said Board of Trustees as there may seem to be urgent need of, including such improvements of the property as they may be prepared and have sufficent funds to make without encumbering the property, but shall not have power to make leases except for a term or terms which shall expire within a period of ten years from the date of these presents. The Board of Trustees of the Chamber of Industry, for the purposes, and under and subject to the conditions, limitations, restrictions, rules, and provisions herein contained and expressed, shall have power to administer and manage the above granted and all other property of the said Institution, and to establish, manage, regulate and govern the said Chamber of Industry. Of the rules and regulations established by the said Board of Trustees for that purpose, a permanent record shall be kept, under the title of "Ordinances of the Chamber of Industry." The Board of Trustees shall not have power to sell, alienate or encumber the herein granted land, or any part of it, but may demise the same, or any buildings, and improvements thereon, for a term or terms, which, until the expiration of one hundred years from the date hereof, shall not exceed twenty years, and after the expiration of that period, no lease or demise shall be for a term greater than fifty years; and every lease or demise made previous to the expiration of one hundred years from the date of this deed, shall expire and terminate at the end of said period of one hundred years, leaving the whole property then absolutely free and unencumbered by leases or otherwise. After the expiration of the said period of one huudred years, or before if deemed expedient and found practicable, the whole of the above granted block of land shall be built up and improved with permanent fire-proof buildings and upon a uniform plan, by the Board of Trustees, which improvements may be commenced as soon after the expiration of forty years from this date, and prosecuted as fast as the necessary money can be raised for the purpose without encumbering the property (land or buildings); it being the intention of the above-named grantor,

that after the said period of one hundred years, all buildings and improvements upon the above granted land, shall be the property of the said Chamber of Industry exclusively. It is also the intention of the said grantor and founder, that the building or buildings covering the said block of land shall be of two or three stories in height, the first or ground story, consisting of portions to be leased out for the purpose of raising funds for the support of the institution, the second floor being set apart for the Assembly Chamber, offices and bureaus belonging to the Institution, and the third floor (if there be three stories) may be for such uses as the Board of Trustees may find most profitable and convenient, it being understood that the Board will be at liberty to place on the third floor such offices used by the Institution as they may deem convenient, on account of being less frequented, or for other reasons. As further conditions attached to the above grant, and for the regulation and government of the said Institution and Establishment, the following fundamental rules, limitations and restrictions are prescribed, to be inviolably observed forever. *First* and foremost, the operations of the said Institution must be confined and steadily directed to the object and result hereinbefore precisely expressed—which are, not directly to relieve want but to prevent it and to ameliorate the condition of those who subsist by manual labor. *Second.*—It shall be a leading object of the Institution, without compensation or reward, to procure useful employment for all who seek it, and to encourage and incite to industry all who are prone to be idle and indolent, and to this end its special efforts shall be directed. *Third.*—The efforts of the Institution, shall likewise be directed to procure that all shall be instructed and trained from childhood to some suitable occupation, whereby they can obtain an honest living. *Fourth.*—Systematic provision shall be made by said Institution, gratuitously, to instruct and inform the laboring class in the best plans and mode of construction for their dwellings, barns, stables, shops and other buildings, so as to render them most healthful and convenient at the least practicable expense, and in all things else, as far as practicable, how their labor can be economized and most effectively applied; and so, without lessening the industry, lighten the toils, and increase the health, comfort and happiness of all classes of laboring men and women. *Fifth.*—In said Institution shall be continually collected and preserved, the most extensive and minute statistics and information respecting every branch of industry, and the information thus collected shall be gratuitously imparted in all time, and to all persons. *Sixth.*—To facilitate the operations of said institution, it shall have established, progressively as need and occasion require, appropriate and convenient departments, bureaus and offices, and an Assembly Chamber of sufficient capacity, in which information and instruction shall be regularly disseminated by means of public addresses and lectures; and for the same purpose it is also contemplated, but not absolutely enjoined, that ultimately, printed books and other publications will be issued by the Institution.

After the lapse of thirty years from the date hereof, Electors of Mont Eagle University (an institution hereafter to be established and organized), who have obtained that title by graduation in the department of Agriculture or the department of Mechanic Arts of said Institution, if they can be found otherwise fit, qualified, sufficiently responsible and willing to serve, shall be appointed to fill vacancies which may happen from time to time in the Board of Trustees whenever there shall be less than a majority of the whole number of members already possesing the degree and title of such Electors, but this provision is not to be construed so as to prevent the appointment of such Electors in a larger proportion than a bare majority of the whole number, or before the expiration of said period of thirty years, if such graduates can be found fit, qualified, responsible and willing to serve, as aforesaid.

It is hereby declared to be the true intent and meaning of this Deed of Foundation, that none of the provisions therein contained are to be deemed or construed as merely directory, but all of said provisions are, and are to be construed, as absolutely mandatory, defining and limiting the powers of said parties of the second part, and of the Board of Trustees of said Chamber of Industry, in such manner as to cause the nullity of acts done in contravention thereof.

In witness whereof, I, the above named Horace Hawes, grantor and founder, have hereunto set my hand and seal, the day and year first above written.

HORACE HAWES. [L. S.]

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss.*

On the thirty-first day of October, A. D. one thousand eight hundred and seventy, before me, Samuel Herman, a Notary Public, in and for said city and county, duly commissioned and sworn, personally appeared the within and above named Horace Hawes, whose name is subscribed to the foregoing instrument as a party thereto, personally known to me to be the individual described in, whose name is subscribed to, and who executed the said foregoing instrument, and duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and fixed my official seal, the day and year in this certificate first above written.

[L. S.] SAMUEL HERMAN, *Notary Public.*

[Endorsed:] Special Findings.
Filed October 21st, 1884.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

JUDGMENT.

UNITED STATES OF AMERICA, *Circuit Court of the United States, Ninth Circuit, District of California.*

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND HORACE HAWES, *Plaintiffs.*
vs.
JAMES G. FAIR, *Defendant.*

No 2785

This cause having come on regularly for trial on the 13th day of December, 1883, being a day in the November 1883, term of said Court, before the Court sitting without a jury. A trial by jury having been expressly waived by written stipulation of counsel for the respective parties hereto duly filed with the clerk of this Court. J. C. Bates and E. J. Pringle, Esqs., appearing on behalf of the plaintiffs, and Wilson & Wilson, Esqs., on behalf of the defendant; and the trial having been proceeded with on the 22nd day of said December, and the evidence on the part of the respective parties hereto having been introduced and closed, and the cause after arguments of Counsel having been submitted to the court for consideration and decision and the court after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith.

Now, therefore by virtue of the law and the finding aforesaid, it is considered by the court that the plaintiffs take nothing by this action, that the defendant go hereof without day and that said defendant, James G. Fair do have and recover of and from said plaintiffs, Horace Hawes and Caroline H. Robinson his costs in this behalf expended, taxed at $22.

Judgment entered October 22nd, 1884.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true and correct copy of an original judgment entered in the above entitled cause.

Attest my hand and the seal of said Circuit Court this 22nd day of October, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

[Endorsed]: Filed October 22nd, 1884.

L. S. B. SAWYER, *Clerk.*

UNITED STATES OF AMERICA, *Circuit Court of the United States, Ninth Circuit, District of California*

JAMES A. ROBINSON *et al.*
vs.
JAMES G. FAIR.

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, within and for the District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the therein entitled action.

Witness my hand and the seal of said Circuit Court this 22nd day of October, A. D. 1884.

[L. S.]

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

[Endorsed] Judgment Roll. Filed October 27, 1884. L. S. B. Sawyer, Clerk. By F. D. Monckton, Deputy Clerk.

PLAINTIFFS' BILL OF EXCEPTIONS AT LAW.

In the Circuit Court of the United States, Ninth Circuit, District of California.

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND HORACE HAWES,
vs. *Plaintiffs and Complainants*
JAMES G. FAIR,
Defendant.

No 2785

Be it remembered that this cause was tried before Hon. Geo. M, Sabin, District Judge of the United States, for the State of Nevada. holding Court in the Ninth Circuit, District of California, for Hon. Lorenzo Sawyer, Circuit Judge, and on the trial of this cause, which took place December 22d, 1883, it being admitted in open Court by counsel for respective parties, that Horace Hawes, at the time of death, was the owner, seized in fee, and in the possession of the fifty vara lot described in the complaint herein.

Said defendant, to maintain the issues and establish title on his part, offered and read with other evidence, all the papers and proceedings had, taken and filed in the Probate Court of the City and County of San Francisco, State of California, in the matter of the estate of Horace Hawes, deceased, among which were the notices, petitions, orders and proceedings in the partition of said estate, contained and set forth in the special findings of the Court in this cause marked "Exhibits A, B, C, D, E, F, G and H" respectively, which are hereby referred to and made a part of this bill of exceptions.

Said defendant also read in evidence "Exhibit J," contained in special findings of fact herein, and also other papers, copies of which are hereunto annexed marked 1, 2 and 3.

Said plaintiffs objected to each and all of said partition proceedings, papers and decree of partition in said Probate Court as null and void, as against said plaintiffs, upon the following propositions and objections to the legal effect thereof, to-wit:

1. That the Probate Courts of the State of California, established under the constitution of California, as it existed in the year 1875, had no jurisdiction to make partition of real estate, but under Art. VI, Sec. 6, of said constitution of California; exclusive jurisdiction in such matters was conferred on District Courts.

2. That if any such jurisdiction existed in the Probate Courts of California, it extended only to the allotment to each heir or devisee in severalty of his portion or interest in each parcel of land, but not to divesting the heir or devisee of title to the whole parcel by conferring or attempting to confer title to another parcel in compensation.

3. That no partition or agreement for partition is valid which does not embrace all parties in interest.

4. That the Probate Court of said City and County of San Francisco had no jurisdiction to entertain a petition for partition presented by the administratrix of the estate of Horace Hawes, on the ground that the administratrix is not a party "interested in the estate."

5. That the said Probate Court never acquired jurisdiction of the persons of the plaintiffs herein, or either of them, or of the subject matter, because:

(*a.*) No notice was ever given to them or to either of them personally, and no guardian was ever appointed for them or either of them.

(*b.*) No notice of settlement of account and distribution was given as prescribed by Sections 1634 and 1539 and 1638 of the Code of Civil Procedure of the State of California.

(*c.*) No notice of proceedings in partition was given as prescribed by Section 1676, C. C. P. of California.

(*d.*) No citation was ever issued or served, and no notice of making the partition was ever given to the plaintiffs personally, or to any guardian appointed to represent them as prescribed by Section 1683, C. C. P. of California, nor any notice of hearing on confirmation of the report of the commissioner.

6. That the proceedings of the commissioner under the decree for partition in said estate of Horace Hawes, deceased, were contrary to the statute and void, because the values of the respective shares allotted was not exhibited, and no value was placed on the respective parcels of land to be divided, and each parcel was not separately divided.

7. That the order of the said Probate Court made on February 18th, 1875, providing for notice of the hearing of the petition for partition, and the notice published thereunder, being "Exhibit B," of special findings, were insufficient and void in this: That no notice was addressed to the plaintiffs herein, by which they were made parties to the proceeding, or contained any description of the property of which partition was to be made.

The Court, after case argued orally, and on printed Briefs of counsel for respective parties, and having duly considered the same, made its special findings of fact and conclusions of law now on file in said cause, to which ruling plaintiffs then and there duly excepted.

Be it further remembered that said defendant, after the trial of

this cause and before the Briefs of counsel for the respective parties were presented to the Court, and before the decision of the Court herein introduced and read in evidence the following stipulation and affidavit of Philip A. Roach, sworn to April 18th, 1884.

To which evidence of said Philip A. Roach, plaintiffs objected as irrelevant, immaterial and incompetent.

The Court overruled said objections, to which ruling plaintiffs duly excepted.

STIPULATION, (1.)

In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

JAMES A. ROBINSON, *et al.*
vs. *Complainants,*
JAMES G. FAIR,
Defendant.
No. 2785.

It is hereby stipulated and admitted by and between the parties respectively hereto, that the annexed affidavit of Philip A. Roach, Esq., may be offered in evidence in the above entitled cause on behalf of defendant, for the purpose of the trial of said action, with the same force and effect as if offered on the trial thereof, and as if the witness was produced and examined in Court on the trial, cross-examination being waived, subject however, to any and all objections by either of said plaintiffs, as to the relevancy, competency or materiality thereof, which objections may be made or taken in a bill of exceptions with the same effect as if taken when offered in evidence.

EDWARD J. PRINGLE, and
J. C. BATES,

Dated April 18, 1884. *Attorneys for Complainants.*

AFFIDAVIT OF PHILIP A. ROACH, (2.)

In the Circuit Court of the United States, Ninth Circuit, District of California.

JAMES A. ROBINSON *et al.*
vs. *Complainants,*
JAMES G. FAIR.,
Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco. } *ss.*

Philip A. Roach, of said City and County of San Francisco, being duly sworn deposes and says: On and before the eighteenth day of February, 1875, and for several years after the last named date, I was one of the printers and publishers of the *Daily Examiner*, a news-

paper during all the times above mentioned published daily (Sundays and holidays excepted) in said city and county. I am a white male citizen of the United States, over twenty-one years of age, and competent to be a witness in the above entitled action, or in any manner relating to the estate of Horace Hawes, deceased, and have no interest whatever in said estate or any of the property ever belonging to the same, nor have I any interest in the above entitled suit or any of the things therein involved.

The order of the late Probate Court of the City and County of San Franeisco, a copy of which is hereto annexed marked "A" (which is same as Exhibit B in special findings of fact herein) was published once a week for four successive weeks before the twenty-third day of March, A. D. 1875, in said Daily Examiner, that is to say: upon the 18th and 25th days of February, and upon the 4th, 11th and 18th days of March respectively in the year 1875.

PHILIP A. ROACH.

Subscribed and sworn to before me this 18th day of April, 1884.

[SEAL.] R. D. Mc. ELROY, *Notary Public.*

AFFIDAVIT OF ADOLPH SCHANDER, (3.)

San Francisco, March 19th, 1875.

STATE OF CALIFORNIA,
City and County of San Francisco. } *ss.*

Adolph Schander, of the said city and county, being duly sworn, deposes and says: That he is a white male citizen of the United States; that he is over twenty-one years of age, and is competent to be a witness on the hearing of the matters mentioned in the annexed order; that he has no interest whatever in the estate mentioned therein; and that he is the principal clerk of the printers and publishers of the *Daily Examiner*, a newspaper which is published daily, (Sundays and legal holidays excepted) in said city and county, and has charge of all the advertisements in said newspaper, and that the order in the case of the estate of Horace Hawes, deceased, of which order the following is a printed copy:

(Being the same order marked "Exhibit B," in special findings herein) has been published once a week for four weeks, in the above named newspaper, commencing February 18th, 1875, and ending March 18th, 1875, (both days inclusive.) And further sayeth not.

ADOLPH SCHANDER.

Subscribed and sworn to this 19th day of March, 1875, before me.

FRED. W. PIERCE,

Deputy County Clerk of the City and County of San Francisco.

[Endorsed:] Filed March 23d, 1875.

WM. HARNEY, *Clerk.*

By A. J. JEGHERS, *Deputy Clerk.*

Be it further remembered that, On settlement of Special Findings J. C. Bates appearing for plaintiffs and Messrs. Wilson and Wilson appearing for defendant.:

Plaintiffs' Counsel requested the Judge who tried said cause to insert and make part of Special Findings the proof of publication of order, to show cause as made and appearing of record in said Probate Court in the matter of said estate, instead of 9th Finding, and the Court refused so to do, to which ruling of the Court said plaintiffs then and there duly excepted.

Said plaintiffs duly objected to the words "which decree was duly given and made" in finding XI as being merely a conclusion of law and not the finding of any fact

And to the words "and all other papers on that behalf necessary and proper" in finding XIII as involving a conclusion of law, and as finding vaguely the issuance and delivery of papers not described as capable of identification.

And to the words "gave notice in writing to all persons interested" and to the words "which notice in writing was in the manner and form prescribed by law" in finding XIV, as being merely conclusions of law.

And to the words "all the persons interested in said partition were duly and legally represented according to law" in finding XV as being a conclusion of law and not the finding of any fact.

And to the words "in the manner and form prescribed by law" in finding XVI as being merely a conclusion of law.

And to the words "in the manner and form prescribed by law" in finding XVII as being merely a conclusion of law.

And to the words "All matters and proceedings of every kind and character at any and all times, had and taken in said Probate Court in the said estate of Horace Hawes deceased, and especially in the final distribution and partition thereof, were and each of them was duly made, given and rendered pursuant to the Statute in such case made and provided" in finding XXI as being merely conclusions of law and not the finding of any fact.

But the Court overruled all these objections of plaintiffs, and the plaintiffs then and there duly excepted to the rulings of the Court.

And plaintiffs pray that this their Bill of Exceptions be signed, sealed and enrolled which is done.

The foregoing Bill of Exceptions allowed.

Witness my hand and seal this the 29th day of November, A. D. 1884, being within the time allowed by law pursuant to a stipulation of the attorneys of respective parties for the preparation and settlement of a Bill of Exceptions in said cause.

GEO. M. SABIN, [L. S.]
District Judge of the U. S. for the State of Nevada.

[Endorsed:] Filed December 2nd, 1884.

L. S. B. SAWYER, *Clerk.*

CERTIFIED COPY OF LETTERS TESTAMENTARY WITH WILL ANNEXED.

I, Horace Hawes, of the City and County of San Francisco, State of California, mindful of the uncertainties of human life, do make, publish and declare this my last will and testament.

After the payment of all my just debts and funeral expenses, I give, devise and bequeath, all the estates both real and personal, of which I may be possessed at the time of my death, as follows:

1st. To my well beloved wife, Eugenie, I give, devise and bequeath a one-half undivided interest in said estates.

2d. To my beloved son Horace, I give, devise and bequeath a one-half undivided interest in said estate.

3d. To my good and kind mother I bequeath nothing; knowing full well her inability to take care of any kind of property, but it is my wish that my wife, from the estate bequeathed to herself and my son, should pay to her monthly, each month, the sum of twenty-five (25) dollars to support her.

4th. It is my wish that no member of the family of my wife should in anyway be connected with the settlement of my affairs, or their subsequent management.

5th. I would advise both my wife and child to allow my estate (if it is invested at the time of my death as it is at this date) to remain invested as it is, and divide the profits thereof between them, as in a very few years the real estate will be of very great value. I would advise them further to be economical and careful, and never to do anything on any ones advice without first reasoning with themselves, and never to do *anything* on impulse.

6th. I hereby appoint and nominate my wife Eugenie, the executor of this my last will and testament, without bonds.

In witness whereof I have hereunto set my hand and seal on this the 8th day of September, 1883.

[SIGNED] HORACE HAWES.

[Endorsed:] Will Horace Hawes. Dated Sept. 8, 1883.
Filed in the Superior Court of the County of San Mateo, December 31st 1884.

J. W. BICKNELL, *Clerk.*
By H. B. THOMPSON, *Deputy Clerk.*

In the Superior Court of the County of San Mateo, State of California.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED. } Letters Testamentary.

STATE OF CALIFORNIA, *County of San Mateo.* } *ss.*

The last will of Horace Hawes, deceased, a copy of which is hereto

annexed, having been proved and recorded in the Superior Court of the County of San Mateo, Eugenie Hawes, who is named therein, is hereby appointed executrix.

Witness, E. Eikerenkotter, Clerk of the Superior Court of the County of San Mateo, with the seal of the Court affixed, the 22d day of January, 1885.

[SEAL OF COURT.] By order of the Court,

E. EIKERENKOTTER, *Clerk.*

STATE OF CALIFORNIA, } ss.
County of San Mateo. }

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully perform, according to law, the duties of executrix of the last will and testament of Horace Hawes, deceased.

EUGENIE HAWES.

Subscribed and sworn to before me this 22d day of January, 1885.

[L. S.] E. EIKERENKOTTER, *Clerk.*

[Endorsed:] No. 294½. Superior Court, County of San Mateo. In the matter of the estate of Horace Hawes, deceased. Letters Testamentary issued to Eugenie Hawes, on the 22d day of January, 1885.

Filed January 22d, 1885.

E. EIKERENKOTTER, *Clerk.*

In the Superior Court of the County of San Mateo, State of California.

IN THE MATTER OF THE ESTATE OF HORACE HAWES, DECEASED. } No. 294½.

I, E. Eikerenkotter, County Clerk of the County of San Mateo, and ex-officio Clerk of the Superior Court for the County of San Mateo, State of California, do hereby certify the foregoing to be a full, true and correct copy of the original letters testamentary issued to, and of the appointment of Eugenie Hawes, executrix of the last will of Horace Hawes, deceased, and also of the last will of said deceased annexed to said letters testamentary, all on file and of record in my office in the above entitled cause and estate. That the same constitute a full and complete exemplification of the letters testamentary and last will of said deceased in the said cause and estate and of the whole thereof. All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 2d day of February, A. D. 1885.

[L S.] E. EIKERENKOTTER,

County Clerk of San Mateo Co., and Ex-Officio Clerk of said Superior Court.

I, E. F. Head, the Judge of the Superior Court of the County of San Mateo, State of California, do hereby certify that the said Court is a Court of Record, having a Clerk and Seal. That E. Eikerenkotter, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of San Mateo, and was, at the time of signing said attestation, ex-officio Clerk of said Superior Court. That said signature is his genuine handwriting, and that all his official acts, as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this second day of February, A. D. 1885.

E. F. HEAD,

Judge of said Superior Court, San Mateo County.

STATE OF CALIFORNIA, } ss.
County of San Mateo. }

I, E. Eikerenkotter, County Clerk of the County of San Mateo, and ex-officio Clerk of the Superior Court of the County of San Mateo, State of California, do hereby certify that the Honorable E. F. Head, whose name is subscribed to the preceding Certificate, is the Judge of the Superior Court of the County of San Mateo, State of California, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court this 2nd day of February, A. D. 1885.

[L. S.] E. EIKERENKOTTER,

County Clerk of San Mateo Co., and Ex-Officio Clerk of said Court.

[Endorsed:] No. 294½. Superior Court, County of San Mateo, State of California. In the matter of the estate of Horace Hawes, deceased.

EXEMPLIFICATION OF RECORD.

Filed in the office of the Clerk of the Circuit Court of the United States, Ninth Circuit, District of California, in the suit of James A. Robinson et al. plaintiffs, vs. James G. Fair, defendant, Register No. 2785, this 4th day of February, A. D. 1885.

L. S. B. SAWYER, *Clerk.*

BOND ON WRIT OF ERROR.

In the Supreme Court of the United States.

JAMES A. ROBINSON, CAROLINE H. ROBINSON HIS WIFE, AND EUGENIE HAWES, *Executrix of the last will of Horace Hawes, deceased.*
Plaintiffs in Error,
vs.
JAMES G. FAIR,
Defendant in Error.

Know all men by these presents, that we, I. T. Milliken and George Comstock, both of the City and County of San Francisco, State of California, are held and firmly bound unto James G. Fair, defendant in error, in the sum of five hundred (500) dollars lawful money of the United States of America, to be paid to the said James G. Fair, his heirs or assigns, to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 4th day of February, A. D. 1885.

Whereas the above named James A. Robinson, Caroline H. Robinson his wife, and Eugenie Hawes, executrix of the last will of Horace Hawes, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the Circuit Court of the United States, for the District of California, in the cause entitled, James A. Robinson, Caroline H. Robinson his wife, and Eugenie Hawes, executrix of the last will of Horace Hawes, deceased, plaintiffs, versus James G. Fair, defendant.

Now therefore, the condition of this obligation is such that if the above named James A. Robinson, Caroline H. Robinson his wife, and Eugenie Hawes, executrix of the last will of Horace Hawes, deceased, plaintiffs in error, shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

I. T. MILLIKEN, [SEAL.]
GEORGE COMSTOCK. [SEAL.]

Signed, sealed and delivered in presence of

UNITED STATES OF AMERICA, *District of California.* } *ss.*

I. T. Milliken and George Comstock, being duly sworn, each for himself, deposes and says: that he is a resident and free-holder in said district, and is worth the sum of five hundred (500) dollars in

lawful currency of the United States of America, exclusive of property exempt from execution and above all debts and liabilities.

I. T. MILLIKEN,
GEORGE COMSTOCK.

Subscribed and sworn to before me this 4th day of February, A. D. 1885.

[SEAL.] EDWARD CHATTIN, *Notary Public.*

[Endorsed:] The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

LORENZO SAWYER, *U. S. Circuit Judge.*

Filed February 4th, 1885.

L. S. B. SAWYER, *Clerk.*

CERTIFICATE TO RECORD.

DISTRICT OF CALIFORNIA. }
}

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circutit, in and for the District of California, do hereby certify that the foregoing fifty-two printed pages, numbered from 1 to 52 inclusive, are a full, true and correct copy of the record, and of all proceedings in the therein entitled cause, and the same together constitute the return to the annexed Writ of Error.

Witness my hand and seal of said Judicial Court this 14th day of February, A. D. 1885.

[SEAL.] L. S. B. SAWYER.

Clerk of the United States Circuit Court, for the District of California.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America,

To the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit in and for the District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between James A. Robinson, Caroline H. Robinson, his wife, and Eugenie Hawes, executrix of last will of Horace Hawes deceased, plaintiffs in error and James G. Fair, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected. and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the City of Washington in the District of Columbia on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of February, in the year of our Lord one thousand eight hundred and eighty five and of the Independence of the United States the one hundred and ninth.

[SEAL OF COURT.] L. S. B. SAWYER.
Clerk U. S. Circuit Court, Dist. Cal.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge 9th Judicial Circuit.

[Endorsed:] The answer of the Judges of the Circuit Court of the United States for the District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the Supreme Court of the United States within mentioned at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[SEAL.] L. S. B. SAWYER, *Clerk.*

[Endorsed;] No. 2785. *United States Supreme Court.*

JAMES A. ROBINSON *et al. Plaintiffs in Error, vs.* JAMES G. FAIR, *Defendant in Error.*

Filed in Clerk's office U. S. Circuit Court, District of California, February 5th, 1885.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

CITATION.

UNITED STATES OF AMERICA, *ss.*

To James G. Fair, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States, for the District of California, wherein, James A. Robinson, Caroline H. Robinson his wife, Eugenie Hawes, executrix of the last will of Horace Hawes, deceased, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, U. S. Circuit Judge, Ninth Judicial Circuit, this 4th day of February, A. D. 1885, and of the Independence of the United States, the one hundred and ninth.

[SEAL OF COURT.] LORENZO SAWYER,

U. S. Circuit Judge Ninth Judicial Court.

[Endorsed]: No. 2785. *In the Supreme Court of the United States.*

JAMES A. ROBINSON *et al. Plaintiffs in Error, vs.* JAMES G. FAIR, *Defendant in Error.*

Service of a copy of the within citation is hereby acknowledged, February 5, 1885.

WILSON & WILSON,

Attorneys for Defendant in Error.

Filed in Clerk's Office, U. S. Circuit Court, District of California, February 5, 1885.

L. S. B. SAWYER, *Clerk.*

By F. D. MONCTON, *Deputy Clerk.*

Endorsed on cover: In the Supreme Court of the United States. James A. Robinson et al. plaintiffs in error, vs. James G. Fair, defendant in error. Transcript on writ of error.

Supreme Court of the United States.

OCTOBER TERM, 1887

JAMES A. ROBINSON ET AL.,

Plaintiffs in Error,

vs.

JAMES G. FAIR,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

J. C. BATES,

Of Counsel for Plaintiffs.

CITATION.

UNITED STATES OF AMERICA, *ss.*

To James G. Fair, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States, for the District of California, wherein, James A. Robinson, Caroline H. Robinson his wife, Eugenie Hawes, executrix of the last will of Horace Hawes, deceased, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, U. S. Circuit Judge, Ninth Judicial Circuit, this 4th day of February, A. D. 1885, and of the Independence of the United States, the one hundred and ninth.

[SEAL OF COURT.] LORENZO SAWYER,

U. S. Circuit Judge Ninth Judicial Court.

[Endorsed]: No. 2785. *In the Supreme Court of the United States.*

JAMES A. ROBINSON *et al. Plaintiffs in Error, vs.* JAMES G. FAIR, *Defendant in Error.*

Service of a copy of the within citation is hereby acknowledged, February 5, 1885.

WILSON & WILSON,

Attorneys for Defendant in Error.

Filed in Clerk's Office, U. S. Circuit Court, District of California, February 5, 1885.

L. S. B. SAWYER, *Clerk.*

By F. D. MONCTON, *Deputy Clerk.*

Endorsed on cover: In the Supreme Court of the United States. James A. Robinson et al. plaintiffs in error, vs. James G. Fair, defendant in error. Transcript on writ of error.

Supreme Court of the United States.

OCTOBER TERM, 1887

JAMES A. ROBINSON ET AL.,

Plaintiffs in Error,

VS.

JAMES G. FAIR,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

J. C. BATES,

Of Counsel for Plaintiffs.

Supreme Court of the United States.

JAMES A. ROBINSON, ET AL.,
Plaintiffs in Error,
vs.
JAMES G. FAIR,
Defendant in Error.

DOCKET NO. 212

BRIEF OF PLAINTIFFS IN ERROR.

BRIEF STATEMENT OF THE CASE, AND HOW PRESENTED.

This action is one usually called ejectment, brought by the two children of Horace Hawes, deceased, to recover two-thirds of a certain 50-vara lot, at the south-west corner of Sansome and Pine streets, in San Francisco. The defendant had judgment, and plaintiffs bring the case here by writ of error, and the questions involved are raised by special findings and bill of exceptions, (Trans , pages 7 and 44), a jury trial having been duly waived.

On the twelfth day of March, 1871, one Horace Hawes died, intestate, the owner in fee of certain lands in San Francisco and San Mateo Counties, including the premises in controversy. (Trans., page 43.)

Said decedent left him surviving, a widow, Caroline Hawes, and two minor children, Horace Hawes, born March 22, 1859, and Caroline H. Hawes, born August 26, 1864. (Trans., pages 7 and 8.)

Part of said estate was *separate* property (Trans., page 7), and part *common* or community property (Trans., page 15).

The only heirs at law of said decedent were his said widow, Caroline Hawes, and said two minor children, Horace and Caroline, plaintiffs herein.

The proceedings in the matter of the estate of said deceased were initiated in the then Probate Court of the City and County of San Francisco. The lot of land in controversy was distributed by a decree of distribution into three equal parts to the three heirs as tenants in common and undivided, on the twenty-ninth of March, 1875, and *after* such decree made, the alleged *partition* of the estate under the Probate Partition Act of California was carried through, in which partition Caroline Hawes was assigned *all* the lot in question, under proceedings in said Probate Court, which are contained in Exhibits A to F, of special findings. (Trans., pages 17 to 37.)

The petition for partition was signed and filed by Caroline Hawes, as *administratrix* of the estate of said deceased (Trans., page 18), and was filed *before* distribution of said estate was made, and at the *same* time the final account was filed for settlement, to wit: February 18th, 1875, (Trans., pages 17, 18 and 19); and the order to show cause (notice of the partition, settlement of final account and distribution) was in *one* notice, and was ordered to be published "once a week for four *successive* weeks in The Daily Examiner," and the affidavit of publication is in bill of exceptions (Exhibit 3, page 46 Transcript), which shows that said notice was published once a week for four weeks, (not four successive weeks).

Said notice of partition, distribution and settlement of final account, did not contain any description of real estate and cited no one by *name*, but ordered "all persons interested in the estate, to show cause."

The defendant, on the trial of this case (Trans., p. 44), some nine years after the partition proceedings was made, introduced, subject to plaintiffs' objections, in evidence an affidavit as a deposition of the publisher of the newspaper to supply the defect in the original record or affidavit of proof of publication of notice in the case, to the effect that said notice was actually published *once* a week for four *successive* weeks.

The difference in the affidavits is this: The one in the case, by which the Court acquired jurisdiction, if at all, was "once a week for four weeks," commencing February 18th, and ending March 18th, 1875, while the latter shows said notice was published *once* a week for four successive weeks, as follows: February 18 and 25, and March 4, 11 and 18, 1875. (Trans., page 46.)

The affidavit in the case in the Probate Court did not show notice was published four *successive* weeks, or on *what* days between Febru-

ary 18th and March 18th, said notice was published. We, of course, claim said affidavit, filed in the case in Probate Court, was fatally defective, and the Court did not acquire jurisdiction to settle account or to order distribution and partition.

The defendant having acquired all the interest of the widow of said decedent (one-third) by WARRANTEE deed (Exhibit I, page 35), he is the owner of one-third, and if said partition proceedings are valid, then of the whole of said fifty vara.

Said minors, plaintiffs herein, were never personally *served* or *named* in the process to bring them before the Probate Court (Trans., page 18, Exhibit B), but some time after said order to show cause why account should not be settled, etc., was published, an attorney was appointed by the Court, March 29, 1875, (Trans., page 19), to represent said minors in said proceedings, who attempted to represent or appear for them, and in form accepted from Commissioner, as such attorney, notice of the proceedings for partition. (Trans., page 25.)

The Commissioner in the partition proceedings, as one Commissioner was appointed, made a report of the *conclusion* reached, dividing or assigning the land very unequally (Trans., pages 28, 29 and 30); that is, divided some pieces into *three* parts, some into *two* parts, and the piece in controversy was *not divided* at all, and no reason assigned in his report for not dividing it, and no value of land reported.

The XXVIIth finding shows that part of the property partitioned was claimed by grantees of decedent, and their rights were expressly reserved in the final order. (Trans., page 34)

There was no order directing how Commissioner should divide the premises.

Said Commissioner's report, which merely divided or set apart the land to each, was in form confirmed by the Probate Court, without any notice thereof; and the principal questions, or vital points, involved and raised by the record in the case, are substantially as follows:

Assignment of Errors.

(1.) That the Probate Court had no jurisdiction of a partition case or proceeding, under the Constitution of California prior to 1880, and no power to divest title.

(2.) The petition was not filed by a person interested in the estate, but by the administratrix of the estate, who has no interest.

(3.) Said Probate Court had no power or authority, under the Probate Partition Act, to divest title without a sale, or when estate cannot be divided without prejudice.

(4.) That the Probate Court, in the partition case or proceeding, did not acquire jurisdiction of the minor heirs of said decedent on the affidavit of publication of the order to show cause, as a notice, found in the record; also no affidavit for publication on ground of non-residence in the county or State.

(5.) It was incompetent to receive in evidence on the trial of this case, an affidavit of publication of the notice to the parties to bring them before the Court to supply defects in the affidavit on which the jurisdiction of the Probate Court depended to settle the account and order partition.

(6.) Minors must be represented by guardian, general or special, and cannot be by an attorney.

(7.) That the report of the Commissioner is defective, not containing the proceedings, but his conclusions.

(8.) No notice, by citation or otherwise, of making the partition, was given to the minors, or any guardian appointed for them.

(9.) A Probate Court, as such, cannot entertain and make partition without prejudice to rights of third parties, grantees of intestate.

The foregoing are the principal propositions involved in the case, but there are many subordinate points that incidentally arise in solution of the main questions.

The Judge who heard and decided the case, did not give any written opinion.

It will be observed at the outset, that on settlement of *Special Findings*, plaintiff's counsel requested the Judge, who tried the case, to insert in and make a part of Special Findings, the proof of publication of the order to show cause, as appearing of record in said Probate Court in the matter of said estate, instead of the ninth finding, and the Court or Judge refused, and an exception was taken. (Trans., p. 47.)

Other findings were objected to as conclusions of law.

The objections to Findings are not such as this Court are accustomed to review, but, as stated by Chief Justice Cooley, in *Wheeler* vs. *Wallace*, 53 Mich., 357, it will scrutinize carefully the record on that account. The plaintiff asked for Special Findings, so as to raise and

present the legal propositions involved on the proof of service of notice in the case as decided by this Court in

Insurance Co. vs. *Sea*, 21 Wal., 160,

one was entitled to, but the Court or Judge refused, hence our exception presented by Bill of Exceptions.

The plaintiff's counsel are not ignorant of the rule of law, that an erroneous judgment, in a case tried according to the course of the common law, is as valid as any other, when jurisdiction of the person and subject matter obtained; for the simple reason errors are presumed to be waived, unless excepted to and reviewed by appeal or writ of error; but in this proceeding such rule does not apply, we claim, for two reasons:

(1.) The partition was a summary statutory proceeding, and must be strictly followed.

(2.) The plaintiffs herein, then *infants*, were incapable of waiving or consenting to anything; hence, what would be an irregularity in case of an adult, amounts to a nullity in case of infant in special proceedings, where title to property is divested. Nullities cannot be waived, irregularities can.

See rule as stated by Lord Coleridge, post page 36 as the test between *irregularities* and *nullities*.

The record in the matter of the estate of Horace Hawes, deceased, is not silent, but affirmatively shows what kind of service was made and *how* ordered to be made.

Settlemier vs. *Sullivan*, 97 U. S., 449.

ARGUMENT.

I.

Probate Court under Constitution given no Power to Make Partition of Real Estate.

Provisions of Constitution of California.

Section 1 of Article VI reads as follows:

"Sec. 1. The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts, and in Justices of the Peace, and in all such Recorders' and other inferior Courts as the Legislature may establish in any incorporated city or town."

Said section merely contains a general statement, as to the courts entitled to exercise judicial power, but, of course, does not define the powers of any one. That is in subsequent sections.

The argument of Mr. Webster on "The Appointing and Removing Power" is very satisfactory on that point as well as instructive.

Webster's Great Speeches, by Whipple, p. 399.

Sections 2, 3, 4, relates to jurisdiction of Supreme Court and appellate power thereof.

Sec. 5 divides the State into judicial districts and provides for the election of judges, terms of office, etc.

"Sec. 6. The District Courts shall have original jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for. The District Courts and their Judges shall have power to issue writs of habeas corpus, on petition by or on behalf of any person held in actual custody, in their respective districts." [Amended 1862.]

"Sec. 7. There shall be in each of the organized counties of the State a County Court, for each of which a County Judge shall be elected by the qualified electors of the county, at the special judicial elections to be held as provided for the election of Justices of the Supreme Court by section three of this article. The County Judges shall hold their offices for the term of four years from the first day of January next after their election. Said Courts shall also have power to issue naturalization papers. In the City and County of San Francisco the Legislature may separate the office of Probate Judge from that of County Judge, and may provide for the election of a Probate Judge, who shall hold his office for the term of four years." [Amended 1862.]

"Sec. 8. The County Courts shall have original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all such special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the Legislature may prescribe; they shall also have appellate jurisdiction in all cases arising in courts held by Justices of the Peace and Recorders, and in such inferior courts as may be established in pursuance of section 1 of this article, in their respective counties. The County Judges shall also hold, in their several counties, Probate Court, and perform such duties as Probate Judges as may be prescribed by law. The County Courts and their Judges shall also have power to issue writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties." [Amended 1862.]

"Sec. 9. The Legislature shall determine the number of Justices of the Peace to be elected in each city and township in the State and fix by law their powers, duties, and responsibilities; *provided*, such powers shall not in any case trench upon the jurisdiction of the several Courts of record. The Supreme Court, the District Courts, County Courts, the Probate Courts, and such other Courts as the Legislature shall prescribe, shall be Courts of record."

California Constitution, Article III, section 1, in regard to distribution of powers, reads as follows:

"The powers of the government of the State of California shall be divided into three separate departments—the legislative, the executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted."

In *Willis* vs. *Farley*, 24 Cal., 499, which was an action to foreclose a mortgage in the District Court while said mortgage was an allowed claim in the Probate Court, where estate was under administration, and it was contended that the Probate Court alone had jurisdiction, but it was held otherwise; the Court said:

"Powers which are granted by the Constitution cannot be taken away by legislative enactments, and remedies which are secured to the citizens by the organic law cannot be destroyed by a department of the government that exists in subordination to the Constitution.'

Also held in said case that the Probate Court did not possess the power to grant relief one was entitled to under the Constitution.

In the case of *Rosenberg* vs. *Frank*, 58 Cal., 402, the Supreme Court of California had occasion to examine Article VI, sections 6, 7, and 8, of the Constitution, after very full consideration and assisted by very learned counsel, and it there said:

"The jurisdiction of the Probate Courts is not defined in the Constitution (quoting from sections 7 and 8). It seems from the above that the Legislature may make the jurisdiction of the Probate Judge or Court what it pleases *within* the *limits* of that jurisdiction which is understood as usually pertaining to Probate Courts."

The phrase, "and perform *such* duties as Probate Judges as may be prescribed by law," in said section 8, could not enlarge the jurisdiction of the Court, otherwise appellate jurisdiction from District Court might be given to the Court or Judge while performing the duties of a *Probate* Judge only.

In the case of *Parsons* vs. *The Tuolumne Co. Water Co.*, 5 Cal., 43, it was held that "each branch of the judicial department has its

functions assigned by the Constitution, and is beyond the control of either department of the government." Above case cited and approved in 5 Cal., 280; 9 Cal., 89 and 146; 19 Cal., 574; 23 Cal., 147; 42 Cal., 62; 59 Cal., 555.

In *Zander* vs. *Coe*, 5 Cal., 230, it was distinctly held that the Legislature could not confer on one Court the functions and powers which the Constitution had conferred on another. The case as to that doctrine has been cited and approved in 5 Cal., 331; 6 Cal., 449 and 162; 7 Cal., 105; 9 Cal., 86; 22 Cal., 172; 25 Cal., 196.

In 30 Cal., 577, the case of *Zander* vs. *Coe* was commented on, and it was there held that the jurisdiction in certain equity case (action to abate a nuisance), which was *expressly* given to County Court under Constitution, was *concurrent* with District Court, which had jurisdiction in *all* cases in equity.

In *Jackson* vs. *The People*, 9 Mich., 117,

Mr. Justice Campbell said:

"There are classes of questions which, by the common understanding from time immemorial, belong to the course of judicial inquiry under the law of the land. The common law and the various charters and bills of rights recognized and assured the right to such an inquiry. And the Constitution of this State, in apportioning the judicial power, as well as affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property and other legal privileges determined by the general tribunals of the State."

In the "celebrated case" of

Martin vs. *Hunter*, 1 Wheat., 560,

this Court, after arguments of able counsel, decided that "it is *the case* and not *the Court* that gives the jurisdiction," and that the judicial power of the Court did extend to ALL CASES of certain classes. The above case has been many times cited and approved. See *Williams* vs. *Bruffy*, 102 U. S., 253.

Partition being then a *case* in equity, and, by express provision of Constitution, *all* cases in equity and ALL cases in law *involving* the title or possession of real estate being given to District Courts, the Legislature could only prescribe the mode of procedure in *that* Court, and so the authorities hereafter cited hold, and that the Probate Court never had any jurisdiction in an *equity* case or "case in

law *involving* title to real estate." The word "*involving*" being construed in *Holman* vs. *Taylor*, 31 Cal., 338; *Polack* vs. *Cummings*, 38 Cal., 683.

Title might be *involved* although not put in issue under said decisions.

In the case of

Ferris vs. *Higley*, 20 Wal., 375,

this Court had occasion to investigate and pass upon the jurisdiction of the Probate Court of Utah, under a Constitution very similar to ours in most every respect, except that after distributing the cases each Court should have jurisdiction over, it continued with a concluding clause, that the jurisdiction of the Probate Court with the others should be as "*limited by law.*" It was there decided that jurisdiction, in an action at law, having been conferred upon the District Court, under the Constitution, that was *exclusive* and not intended to be given to the Probate Court or a Court of Probate Jurisdiction.

In the above case several authorities were cited and approved from Kansas and Idaho, where the Legislature attempted to confer on Probate Courts "*common law and chancery jurisdiction,*" and it was there held such act was inconsistent with the organic law and *void.*

Also in the case of *Galliland* vs. *Adm'r of Sellers*, 2 Ohio St., 223, it was held that a decree of Probate Court, involving jurisdiction of a Court of equity to cancel a mortgage after payment, void.

Also in *Cox* vs. *Ingleson*, 30 Vt., 261, it was decided that if concurrent jurisdiction in partition among heirs, it should be taken by *heir* and not through administrator.

In the case of *Strong* vs. *Strong*, 8 Conn., 408, affirmed in 32 Conn., 571, the Court there noticed the plain distinction as to the jurisdiction of the Probate Court in estates testate and *in*testate.

In the case of

Davenport vs. *Caldwell*, 10 S. C., 348,

the Supreme Court examined very fully the Statute conferring jurisdiction on the Probate Court to make *partition* of real estate, and after very full consideration it was held it had not the power or jurisdiction to make partition.

The Constitution in that State *distributed* the judicial power almost identical with California, as will be noticed by reference to the case there cited,

McNamee vs. *Waterbury*, 4 S. C., 167.

It will be seen by reading the opinion of C. J. Moses in the last case, that the jurisdiction conferred on Probate Courts embraced *all* matters of testamentary and administration. Certainly the Probate Court in California could not embrace more.

C. J. Shaw in *Peters* vs. *Peters*, 8 Cush., 539, says: * *

"But in our view the Court of Probate, like the Ecclesiastical Courts of Great Britain, to which it has constant reference, is a Court of peculiar jurisdiction having a *separate* and exclusive jurisdiction over and in a particular class of subjects, particularly wills, administrations and the settlement of estates of deceased persons."

Then quoting from Lord Coke: "Having spoken of these Ecclesiastical Courts and also of the Temporal Courts for the trial of lands and goods, he observes, 'and certain it is that this Kingdom hath been best governed and peace and quiet preserved when both parties, that is, when justices of the Temporal Courts and the Ecclesiastical Courts have kept themselves within their proper jurisdictions, without encroaching or usurping one upon another. This is the germ and origin of the system of entire separation of these jurisdictions and to maintain and preserve this separation, a series of Appellate Courts is provided * *."

Blackstone says on the subject of a separation of a jurisdiction:

"(2.) The third commences with the reign of Edward the First, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm that more was done in the first thirteen years of his reign to settle and establish the *distributive* justice of the kingdom, than in all the ages since that time put together. * *

* * * * * * * *

"(3.) He defined the limits of the several Temporal Courts of the highest jurisdiction, those of the King's Bench, Common Pleas, and Exchequer, so as they might not interfere with each other's proper business; to do which they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property."—Wendell's Blackstone's Com., Vol. IV, Page 425.

It had never been questioned but that the District Courts of California had jurisdiction of partition of real estate and ample authority under the Statute for Partitions to meet every case.

At common law partition was unknown in Probate Court.

In the case of *Hollman* vs. *Bennett*, 44 Miss., 322, the Court uses the following language:

"The Probate Court has no jurisdiction over land for any purpose whatever by the Constitution, or inherently in the nature of its organization. It is only by virtue of the special conditional power conferred by the Legislature on the happening of the event named in

the statute, that the Probate Court can assume jurisdiction over the land which has vested in the heirs.

"At common law, the functions of the administrator are confined to the personal estate; by our law, his duties are precisely the same, except upon the contingency of a deficiency of personal estate to pay debts." * *

In the case of *Bank of Hamilton* vs. *Dudley*, 2 Pet., 523, C. J. Marshall says: * *

"*Jurisdiction of all probate and testamentary matters may be completely exercised without possessing the power to order the sale of the lands of an intestate.*" * *

In *Brenham* vs. *Story*, 39 Cal., 186, the following language is used:

"The duty of an administrator is to take charge of the estate for the purpose of settling the claims, and when they have been satisfied it is his duty to pass it over to the heir, whose absolute property it then becomes. To allow the administrator to sell, to promote the interests of those entitled to the estate, would be to pass beyond the proper functions of an administrator, and constitute him the forced agent of the living for the management of their estates."

In *Wheeler* vs. *Bolton*, 54 Cal., 305, the Court said:

"When a decree of distribution has been made, the Probate Court has no longer jurisdiction of the property distributed, unless to compel delivery." * *

Section 1666, C. C. P., in reference to *Distribution*, reads as follows:

"In the order or decree, the Court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

The section is construed in

Freeman vs. *Rahm*, 58 Cal., 114,

as to the conclusiveness of decree.

But, as before stated, the lot in controversy was distributed March 29th, 1875, in *equal parts* to the widow and said two children, and upon any subsequent day the plaintiffs herein had an absolute right under the said statute to bring suit in District Court for the

recovery of the same and rents, or for partition, and it is clear the jurisdiction of District and Probate Courts not concurrent.

It was not until *after* the distribution was actually decreed and made, that partition was ordered (Trans., p. 23, Ex. E.) and thereafter made, not as proper or necessary or as incidental to closing the estate, but simply as a partition case or proceeding.

In a late case in Minnesota,

Hurley vs. *Hamilton*, 33 Northwestern Rep., 912,

which was an action for the recovery of an undivided one-sixth of certain real estate, and involved the question of jurisdiction of the Probate Court to order partition after distribution made, and the opinion of the Court is as follows:

"The Constitution expressly limits the jurisdiction of the Probate Court to the estate of deceased persons and persons under guardianship. It follows that it can have no general jurisdiction in regard to the partition of real estate. The power to make partition, conferred upon that Court by Gen. St. c. 55, is only given as an incident of settling the estates of deceased persons, and as a part of the final step of administration, viz: the division of the property among the heirs or devisees after the estate has been otherwise fully administered. This chapter provides, in certain cases, for a division or partition and an assignment to each of his share in severalty. In other cases the partition may be dispensed with, and the estate assigned to all in common or undivided shares. But the partition provided for is but a step towards an assignment, and it is to be done while the land is still in the possession of the executor or administrator for the purposes of administration. The statute never contemplated a proceeding in Probate Court for the purpose of partition after the administration is closed and the lands assigned or turned over to the heirs or devisees. When that is done, the property has passed out of court, and the Probate Court has no longer any jurisdiction over it. Any proceeding thereafter for partition would not be a step in the administration of the estate of a deceased person, and hence would not be within the jurisdiction of a Probate Court. See *State* vs. *Probate Court*, 33 Minn., 94; 22 N. W. Rep., 10; *Cox* vs. *Ingleston*, 30 Vt., 258. Order affirmed."

The above decision applies to this case, we think, with much force, because on the 29th day of March, 1875, the Court distributed and set apart to each his share of the real estate (there being no personal property), and thus took away the subject matter from the Court and left nothing more to do as a *step* or proceeding in the administration. Administratrix could not collect rents from that date even.

If *estate* was personal property, it would be divided immediately; but in case it was such as needed judgment to separate it, then Commissioners might be called in, in case there were minors, and that is all the "partition or distribution" referred to in the Probate Partition Act, means. Sections 1675, 1678–9, do not mean to divide the *estate*, real and personal, and give one distributee money, another cattle, another furniture, another farming implements, and another land. So in regard to real estate, it is not the purpose or scope of the law to transfer one lot to one heir, another lot to two, and a third lot to three.

The partition act hereafter inserted will be further considered.

Debts of decedent being equitable liens against real estate, *after* personal property exhausted, would seem to be good reason for selling real estate to discharge the claims, and would come under the rule, or exception to rule laid down by U. S. Supreme Court in 5 Otto, 714, and 13 Otto, 439, and numerous other recent decisions in State Courts; but to convey real estate on which no lien attaches and thus divest the title without consent of infant owner, or on constructive notice, is quite a different question.

By looking into the Constitutions of various States of the Union, I fail to find that any State has left its Probate Court (sometimes called Surrogate, Orphan's and Chancery Court) with so little power and authority as the Constitution of California has, especially when "the common law of England is made by the Statute, the rule of decision in all the Courts, if not repugnant to or inconsistent with the Constitution."

Political Code, § 4468;
Hawes vs. *Stebbins*, 49 Cal., 372.

Our Constitution creates a "Probate Court," but is silent as to its powers or jurisdiction. The following authorities hold that the Probate Court, as such, has no jurisdiction in equity cases, and no process to bring proper parties before the Court:

Estate of Corwin, 61 Cal., 162; *Haverstick* vs. *Truedell*, 51 Cal., 431; *Meyers* vs. *Farquharson*, 46 Cal., 200; *Holman* vs. *Bennett*, 44 Miss., 322; *Davenport* vs. *Caldwell*, 10 S. C., 348; *Gilliland* vs. *Sellers*, 2 O. St., 223; *Cox* vs. *Ingleston*, 30 Vt., 261.

Mr. Gary, at section 606, says:

"The proceedings for partition in the Probate Court, (in Wis.,) is a proceeding in equity with a jurisdiction more restricted than that

of the Courts of general jurisdiction, and the question of title to lands cannot be tried in those proceedings." Citing *Deery* vs. *McClintock*, 31 Wis., 195.

It will be noticed hereafter that the judicial power in Wisconsin is delegated by the Constitution itself to the Legislature, but not so in California. *Whitney* vs. *Parker*, 63 N. H., 416, was a case of *partition*, and it was expressly held that if the estate is so situate it cannot be divided without prejudice, it may be assigned to one by *consent* of the other, etc.; but if consent not obtained, that part of report a *nullity* where one's interest assigned and money ordered to be paid to equalize it. Citing *Barney* vs. *Leeds*, 54 N. H., 122, 143, where it is held that resort must be had to a Court of equity, where there is ample, flexible and more appropriate remedies, otherwise an infant or adult is forced to sell or incumber his inheritance against his will.

The reason of such an oppressive rule illustrated in last case, page 145.

Clearly, then, said Sections 1680, 1681, C. C. P., found on page 21, are of doubtful validity in view of the above cases and

Brenham vs. *Story*, 39 Cal., 186.

An action in partition is an undoubted branch of equity jurisdiction is the decision in *Whitten* vs. *Whitten*, 36 N. H., 332.

Freeman, on Co. and Part., § 428, *et seq.*, states that it is generally considered that the statutory remedy is *cumulative* and in no way divesting Courts of Equity of their jurisdiction.

Baily vs. *Sisson*, 1 R. I., 233; *Arms* vs. *Lyman*, 5 Pick., 210; *C. C. P.*, § 755, hereinafter inserted; *Story's Eq. Jur.*, § 656, *et seq.*; *Rutherford* vs. *Jones*, 14 Ga., 521.

A proceeding for a partition is a civil action, and service of summons is to be made accordingly on all interested, personally, or by publication in certain cases.

C. C. P., § 752, *et seq.*, hereinafter inserted.

In partition all the parties are actors, each against each and all others.

Morenhaut vs. *Higuera*, 32 Cal., 295; *Senter* vs. *De Bernal*, 38 Cal., 638; *Reed* vs. *Allison*, 61 Cal., 461; See Sec. 759, C. C. P., post., page 22.

The case of

Wildy vs. *Bonney*, 28 Miss., 714,

turned on the validity of a partition in probate proceedings after report of commissioners was *confirmed* by the Probate Court. That is, the title of plaintiff depended upon a partition in Probate Court under provisions of law quite as full as that in California.

The Court said: * * * "And this presents the question whether the action of these Commissioners divested the right and interest of Mrs. Pierce in the lands, and vested the same in A. C. Hale, and we are of the opinion that it did not."

"By the provisions of the Act of 1821, the Probate Court was empowered to appoint Commissioners to make a division of lands between the heirs of an intestate, the metes and bounds of each heir's share to be ascertained by the Commissioners and reported to the Court. The object of the statute was simply to have partition made to and among all the heirs, ascertaining the share of each of them *separately*. No power was given to the Court or Commissioners to divest the title of any one of the heirs, and to vest it in another heir, so as to pass the legal title. The simple and sole duty was to ascertain the share of each heir." (See Sec. 1684, C. C. P., hereinafter inserted, page 21.)

Section 1677, C. C. P., hereafter inserted on page 20, of this Brief, says: "The estate in each county must be divided *separately* among the heirs," etc.

The case of *Billings* vs. *Teel*, 76 Va., 487, was ejectment, and the question turned on the legal effect of the report of Commissioners in a partition case *confirmed* by the Court, and it was there held no title was divested by the confirmation.

Also a case in this Court,

Gay vs. *Parpart*, 16 Otto, 688,

the effect of the two kinds of partition considered and clearly distinguished, and holds that a proceeding in *chancery* for partition *did not divest title.*

To the same effect are the following authorities, which hold that in case infants are parties, the partition not complete till minors become of age, so as to execute deeds:

Smith vs. *Crawford*, 81 Ill., 299; *Wadhams* vs. *Gray*, 73 Ill., 429; *Chickering* vs. *Failes*, 29 Ill., 304; Story Eq. Jur., Sec. 652; Wash.

on Real Prop., 3d ed., vol. 1, p. 582; Blackstone Com. (Wend.), p. 184, note (14).

The first Section, 1675, C. C. P., found on page 20, of this Brief, merely provides that when the estate, real or personal, assigned by the decree of distribution among the heirs, devisees or legatees, is in common or undivided, and respective shares not separated and distinguished, partition *or distribution* may be made by three Commissioners, etc.

No power to divest title, it will be noticed, nor do Sections 1679 or 1684, in terms, divest title, but leaves it same as partition in chancery, which requires deeds to be exchanged.

Partition is not a proceeding *in rem*, but *inter partes*.

Childs vs. *Hayman*, 72 Ga., 779.

Freeman on Co. and Part., at Sec. 463, has the following heading: "*All the co-tenants must be parties.*"

In the authorities there cited several cases hold that unless *agreement* of partition, or a *suit* in partition embrace ALL the parties in interest, it is *void*. *Hill* vs. *Den*, 54 Cal., 23; *Sutter* vs. *San Francisco*, 36 Cal., 112; *Burhans* vs. *Burhans*, 2 Barb. Ch., 407.

In

Barney vs. *Baltimore City*, 6 Wallace, 284–5,

the Court, by Mr. Justice Miller, used the following language: * *

"And there is a third-class (including partition), whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the Court cannot proceed. In such cases the Court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.

"This class cannot be better described than in the language of this Court, in *Shields* vs. *Barrow*, in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature, that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.'"

There were parties interested in said estate, not made parties to said partition the record shows, which will be noticed hereafter.

In the case of

Ward vs. *Corbett*, 72 Ala., 438,

the Court held that the Probate Court had no jurisdiction in partition where the real estate not susceptible of *division* into *equal* parts.

Also, in case of *Rutherford* vs. *Jones*, 14 Ga., 521, 60 Am. D., 625, the Court held where there were several lots, some improved and others not, *all* must be divided or sold—there could not be a division of some and others undivided.

So said Partition Act, C. C. P., Sections 1680, 1681 and 1682, provides, in express terms, that if the real estate cannot be divided, or any tract or *tenement*, the *whole* may be assigned on certain conditions, which must appear in the *report* of Commissioners, and *value must* be reported, etc.

No such partition made or attempted in this case, as appears on face of the report of Commissioner. No value reported at all, and for that reason Court would have no power to confirm any report.

Jenks vs. *Howland*, 3 Gray, 536.
Cited and approved in 133 Mass., 450.

While there have been partitions made in the Probate Court in some States, yet they were confined to the *heirs* alone or their assigns, as will appear by the following cases:

In case of *Kelley* vs. *Kelley*, 41 N. H., 503, the Court uses following language:

"Where the parties are not *co-heirs* the Court of Probate has jurisdiction only in case there is no dispute about the title. Any proceedings there are nugatory, unless *all parties assent* that they should be had there, because the jurisdiction is ousted by any controversy as to the title. It is, therefore, the usual course to petition the Supreme Court or commence a bill in equity in such cases."

Also, in another case, *Mehaffy* vs. *Dobbs*, 9 Watts (Pa.), 376, Gibson, C. J., uses the following language:

"The statutory partition is evidently adapted to, and therefore intended for, an intestate's several estate, actually possessed by him at his death, and indisputably held in common by his children. The preliminary course of proceeding where he has held in common in his lifetime was pointed out in *Strohecker* vs. *Feather*, 3 Penn., 505; in which it was ruled that the Orphans' Court cannot make partition

betwixt the children and their father's co-tenant, and among the children themselves.

"For the same reason it is necessary first to settle before tribunal a question of joint or several tenure between the children themselves, where one is made, and then to make partition in the Orphans' Court of the whole or a part according to the event; and this is admitted to be the proper *course* where disputant is a stranger."

To same effect is case of *Harlan* vs. *Langham*, 69 Pa. St., 237; *Snyder's Appeal*, 36 Pa. St., 166.

The last case holds said Orphans' Court has equity powers limited by the statute.

A decree is not binding as to "any matter incidentally involved," nor against anything argumentatively inferred from it.

Ihnsen vs. *Ormsby*, 32 Pa. St., 201.

In *Arms* vs. *Lyman*, 5 Pick., 211, it is said:

"This statute gives no power to the Judge to cause partition of the share claimed by one heir or devisee, leaving the others tenants in common of the residue. If such a partition is wanted application must be made to the Courts of law, as heretofore provided."

But even in Courts of Probate, Partitions have not stood the test unless *strictly* in accordance with the statutes.

In a late case in Vermont, *Probate Court* vs. *Winch.*, 57 Vt., 285, the Court says:

"The Probate Court does not proceed according to the course of the common law, but has a special and limited jurisdiction given by *statute;* and if it appears on the face of the proceedings that it has proceeded in a manner prohibited, or not authorized by law, its orders and decrees are absolutely void, and may be treated as a nullity. *Hendricks* vs. *Cleaveland*, 2 Vt., 329; *Smith* vs. *Rice*, 11 Mass., 507; *Hunt* vs. *Hapgood*, 4 Id., 117; *Sumner* vs. *Parker*, 7 Id., 79."

The case of *Smith* vs. *Rice*, 11 Mass., 507, is a very important case on a division or rather assigning all one's interest without notice.

In *Jenks* vs. *Howland*, 3 Gray, 537, the Court, after reviewing a *number* of authorities, states the rule as follows:

"The rule, as established by these cases, briefly stated, is, that though the Probate Court has jurisdiction over the general subject, yet, if it clearly exceeds it powers, or does an act prohibited by law, its decree may be avoided, not merely by appeal, but in collateral

proceedings. It is not the indiscreet exercise of a power granted, but the doing of an act for which no power is given, or which is expressly prohibited."

To the same effect are the following cases:

Coghlan vs. *Livingston*, 17 N. Y., 222; *Hughes* vs. *Hughes*, 72 Mo., 136; *Carson* vs. *Hughes*, 90 Mo., 176.

Many other cases might be cited to the same effect, that in such cases when a party claims title under such proceeding, the statute is looked to for the measure of power and not to the recitals in the proceedings or judgments.

The rule established by the adjudged cases is, that if the Probate Court proceeds in a way *not authorized* by the statute its decrees are *void*, not merely voidable.

In *McDonald* vs. *Katz*, 31 Cal, 169, Shafter J., delivering opinion of Court, says:

"The counsel for defendant * * claims * * that the shortening of the interval allowed by law to the creditors in which to appear and show cause * * * was not of jurisdictional consequence, but an irregularity merely. But as the jurisdiction is a statute creation, the alleged distinction is an impossible one."

In California and many other States, a proceeding to sell real estate of decedent to pay debts is one *adversary* to the heir and not strictly *in rem*, and a *strict* compliance with every provision of the statute must be made, or sale void.

Townsend vs. *Tallant*, 33 Cal., 52; *Estate of Boland*, 55 Cal., 315; *Pryor* vs. *Downey*, 50 Cal., 388; *Janes* vs. *Throckmorton*, 57 Cal., 387; *Mickel* vs. *Hicks*, 19 Kans., 578, and cases cited; *O'Dell* vs. *Rogers*, 44 Wis., 172; *Fishe* vs. *Kellogg*, 3 Or., 503; *Schneider* vs. *McFarland*, 2 Com. (N. Y.), 461.

II.

Administratrix, as Such, not Interested in the Estate in a Partition, and Cannot Initiate Proceedings Therefor.

Petition for Partition must be by a party *interested* in the Estate to confer jurisdiction under Section 1676, C. C. P., found at page 20 of this Brief.

The Section 1668, in reference to *distribution*, provides who may petition for *distribution*, which is as follows:

"The order or decree may be made on the *petition* of the *executor* or *administrator*, or of *any person interested in the Estate*. Notice of the application must be given by posting or publication, as the Court may direct, and for such time as may be ordered. If partition be applied for as provided in this chapter, the decree of distribution shall not divest the Court of jurisdiction to order partition, unless the estate is finally closed."

The sections of the Code of Civil Procedure applicable to Partitions in Probate Court, with some sections applicable to an action for Partition in District Court, are as follows:

PROBATE PARTITION ACT, C. C. P. CALIFORNIA.

"Section 1675. When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition *or distribution* may be made by three disinterested persons, to be appointed commissioners for that purpose by the Probate Court or Judge, who must be duly sworn to the faithful discharge of their duties.

"A certified copy of the order of their appointment, and of the *order or* decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be endorsed thereon. Upon consent of the parties, or when the Court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules, as if three were appointed."

"Section 1676. Such partition may be ordered *and had in the Probate Court* on the petition of *any person interested*. But *before* commissioners are appointed, or partition ordered *by the Probate Court*, as directed in this chapter, *notice thereof must* be given to *all persons interested*, who reside in this State, or to *their guardians, and* to the agents, attorneys or *guardians*, if any in this State, of such as reside out of the State, either *personally* or by *public notice*, as the Probate Court may direct. The petition may be filed, attorneys, guardians and agents appointed, and *notice given*, at any time before the order or decree of distribution, but the commissioners *must* not be appointed until the order or decree is made distributing the estate."

"Section 1677. If the real estate is in *different* counties, the Probate Court may, if deemed proper, appoint commissioners *for all*, or different commissioners for each county. The *estate* in each county *must* be *divided separately among the heirs, devisees, or legatees*, as if there was no other estate to be divided, but the commissioners first appointed *must*, unless otherwise directed by the Probate Court, make division of such real estate, wherever situated within this State."

Section 1678. Partition *or distribution* of the real estate may be made as provided in this chapter, although some of the original heirs, *legatees*, or devisees may have conveyed their shares to other persons, and *such shares* must be assigned to the person holding the same, in the *same manner* as they otherwise would have been to such *heirs, legatees*, or *devisees.*

Section 1679. When both distribution and partition are made, the *several shares* in the *real* and *personal* estate *must* be set out to *each* individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless *two* or more of the parties interested *consent* to have *their* shares set out so as to be held by them in common and *undivided.*

Section 1680. When the *real* estate *cannot* be *divided* without *prejudice* or *inconvenience* to the *owners*, the Probate Court may *assign* the *whole* to one or more of the parties entitled to share therein, who will accept it, *always preferring* the *males* to the *females*, and among children preferring the elder to the younger.

The parties accepting the whole *must pay* to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and *the true value* of the estate *must* be *ascertained* and *reported* by *the* commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the Court, and recommend that the whole be assigned as herein provided, and must *find* and *report the true* value of such real estate. *On filing* the report of the commissioners, and on making or securing the payment, as before provided for, the Court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and *the title to* the whole of such real estate *vests* in the person to whom the same is so assigned.

Note. The word *owners*, used in this section, on account of right of one to take by assignment, from "*heir, devisee, or legatee*," not by grant or deed from decedent.

Section 1681. When *any tract* of land or *tenement* is of *greater value* than any one's share in the estate to be divided, *and cannot* be *divided* without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving *preference* as prescribed in the preceding section. The party accepting *must* pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners *must* make their award accordingly; but such *partition must not* be established by the Court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

Note. Horace Hawes was the oldest male the record shows.

Section 1682. When it *appears* to the Court from the *Commis-*

sioners' report that it cannot *otherwise* be *fairly divided and* should be sold, the Court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a Commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed, in the same manner and under the same requirements provided in Article IV, Chapter 7, of this title.

Section 1683. *Before* any partition is *made*, or any estate divided, as provided in this Chapter, *notice must* be given to *all* persons *interested* in the *partition*, their *guardians*, agents or attorneys, by the Commissioners, of the *time* and *place*, when and where they shall *proceed* to make partition. The Commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the *matters* before them.

Section 1684. The Commissioners *must report their proceedings*, and the partition agreed upon by them, to the Probate Court, in writing, and the Court may, for *sufficient reasons*, set aside the report and commit the same to the same Commissioners, or appoint others; and when such report is *finally confirmed*, a certified copy of the *judgment or* decree of partition made thereon, attested by the clerk under the seal of the Court, must be recorded in the office of the Recorder in the County where the lands lie."

As to what a report of Commissioner must contain, see authorities on page 45, of this Brief.

Section 1713. Except as otherwise provided in this title, the provisions of Part II of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

ACTIONS FOR PARTITION, C. C. P.

Section 752. When several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

Section 753. The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint, specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Section 756. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in,

or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

Section 757. If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Section 759. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the Court, before the judgment of sale can be made, and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

By comparing Sections 1675 to 1684 with Sections 752, 753, 756, 757, 759 and others following, it will be seen that the District Court had united both jurisdiction in partition, to try title and also adjust equities, while in the probate partition unless the estate assigned and compensation paid, the Commissioner merely made a partition or allotment of the shares.

The petition in this case commences thus:

[Title of Court and Estate.]

"Your petitioner, Caroline Hawes, respectfully represents that she is the widow of Horace Hawes, deceased; and that Horace Hawes, aged sixteen years, and Caroline C. Hawes, aged ten years, and your petitioner, are the only heirs at law of decedent. * * *

"Wherefore your petitioner will ever pray, etc.

"CAROLINE HAWES,

"*Administratrix of the Estate of Horace Hawes, deceased.*

"Verified: Caroline Hawes, administratrix, etc., says that she is the petitioner," etc.

The order to show cause or notice commences as follows: "On reading and filing the report and petition of Caroline Hawes, administratrix of the Estate of Horace Hawes, deceased." * * *

Under the authority of *Estate of Massey*, 65 Cal., 287, a petition or notice of appeal signed as above would be treated as that of administratrix.

In the case of

Cox vs. *Ingleston*, 30 Vt., 260,

which was ejectment, and depended upon the effect of proceedings in the Probate Court for partition, Redfield, C. J., delivering the opinion of the Court, said: * *

"The Probate Courts have no general jurisdiction in regard to partition. * * But when an administration is closed and the estate surrendered to the heirs, * * it seems very unreasonable that he should be allowed to have any agency in regard to a partition of the estate among the heirs. But if the Probate Court still retains any such jurisdiction, and have any power to make partition among the heirs, it must be concurrent with the County Court jurisdiction on the same subject.

If there being any such concurrent jurisdiction (which seems to us not very probable) between the County and Probate Court in regard to partition among heirs, it should, it would seem, be taken by the heirs themselves and not through the instrumentality of an executor or administrator, who has no legal custody or control of the estate and no proper agency or appropriate function in regard to it. This disposes the partition in the case, as it was taken at the instance of the *administrator*."

Chief Justice Redfield has acquired a national reputation as an author on the Law of Wills and matters pertaining to administrations of estates and jurisdiction thereof, and his opinions are generally entitled to great weight.

In *Whitlock* vs. *Willard*, 18 Fla., 167, the Court decides that an *administrator* as *such* has no authority to apply for partition.

Freeman on Co. and Part., Sections 454 and 551.

In *Vick* vs. *Vicksburg*, 31 Am. Decis., 184, the following language is used:

"The defendant to it, the pretended administrator, was alike a perfect stranger to the whole subject matter before the Court, and it was brought about on *ex parte* proceeding, begun and carried through by persons who had not a shadow of claim, legal or equitable, to the land appropriated. It would be a reproach to the law if such a state of facts could find sanction under the principles." * *

Said Section 1668, regulating DISTRIBUTION of estates, expressly provides that *executor*, *administrator*, or "*any person interested in the estate*," may petition for distribution; but said Section 1676 provides and thereby *limits* the petition for PARTITION to "*any person interested.*"

Administratrix, as such, no title or interest in the real estate, and is not a person or party in interest, or a proper or necessary party to a partition, the adjudged cases hold.

Bates vs. *Ryberg*, 40 Cal., 465; *Forster* vs. *Newton*, 46 Miss., 663; *Bowles* vs. *Allen*, 16 Ill., 30; *Hoare* vs. *Harris*, 11 Ill., 25; *Williams* vs. *Wiggard*, 53 Ill., 233; *Nason* vs. *Williard*, 2 Mass., 478; *Fox* vs. *Minor*, 32 Cal., 111; *Estate of Wright*, 49 Cal., 551; *Estate of Massey*, 65 Cal., 287; *Johnson* vs. *Ray*, 67 Ala., 603; *Freeman on Co. and Part.*, § 454; *Shipman* vs. *Rutherford*, 47 Mich., 488.

While an Executor under said Section 1668, C. C. P., by the express provision therein given may *petition* for distribution of estate to heirs, yet he cannot, as such, appeal, as he has no interest in the estate as such.

The reason that petition was filed by administratrix in Hawes Estate was, that Final Account of Administratrix was filed with petition for distribution and partition. That is, *one* petition for distribution and partition united, when the statute allows administratrix to petition for distribution, but not for partition.

In *Alsbrook* vs. *Reid*, 89 N. C., 153, it was held in a "special proceeding" for partition, that the petition was fatally defective, and would not give jurisdiction if it did not allege, among other things, that the parties were tenants in common, etc.—No such allegation in this petition.

In the case of *Savary* vs. *Da Camara*, 60 Md., 147, it was held that if it was disclosed that complainants had not a community of interest it would disclose want of jurisdiction to entertain the partition. It was also held in said case (page 148) that complainants, having no standing in Court, they could not bind others who had an interest, by constructive service, by publication of notice.

III.

No Power to Divest or Extinguish Title on Constructive Service or Without Due Notice.

In a recent case in this Court in an action to Quiet Title, the regularity of proceedings not objected to, but as to the validity on constructive service, the Court said,

Hart vs. *Sansom*, 110, U. S., 155:

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the Court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, *unless otherwise specially provided by statute*, is clearly not a judgment *in rem*, establishing a title in land but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. * * * (Citing cases.) * * *

"But in such a case, as in the ordinary exercise of its jurisdiction, a Court of Equity acts *in personam* by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title." * *

In *McBain* vs. *McBain*, 15 Ohio St., 357, (86 Am. Dec., 481,) it was held, that a person is not bound in partition who has no actual notice otherwise than by publication of notice.

In *Richards* vs. *Rote*, 68 Pa. St., 252, the Court said:

"The power to divest men of their estates and transfer them to others is a momentous one to be exercised with great care and caution. Before it can be made effective, the Court must possess itself not only of the subject, but of the person whose interests are to be dealt with."

The following cases hold that a proper notice indispensable to a valid judgment, and that the Legislature cannot dispense with due notice:

Boorman vs. *Santa Barbara*, 65 Cal., 315; *State* vs. *Fond du Lac*, 42 Wis., 298; *Thomas* vs. *Gain*, 35 Mich., 164; *Stuart* vs. *Palmer*, 74 N. Y., 183; *Mulligan* vs. *Smith*, 59 Cal., 231, 243.

Under the rule of law, as announced in above cases, if the notice or order to show cause of Feb. 18, 1875, is a compliance with the Statute, (which we by no means concede) then it is unconstitutional and void, as not *naming* any person or *describing* any real estate, or even informing one where any real estate is, or that there is any real estate in any particular State or county to partition.

Justice Agnew, in the case of *Philadelphia* vs. *Miller*, 49 Pa. St., 448-9, (a case involving legality of a tax,) uses the following language:

"Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or prop-

erty. * * A thing, whether land or chattel, to be the subject of legal action, must be proceeded against *by name* or *by description*; but a name is descriptive only because it has become associated with the person or thing named. A name, therefore, which has never become connected in any manner with any title or possession of land, clearly infers no means of its identification."

Neither *name* nor *description* of property found in the notice in this case. (Trans., page 18.)

C. J. Dixon, in 34 Wis., 446, says:

"The law is most justly unrelenting in its abhorrence, and unalterable in its condemnation of every act or step in its nature *final*, which shall be done or taken *ex parte* or *without notice* to the other party, when such notice can be given. It will not tolerate such act or step, but unhesitatingly declare it void upon the broadest and most obvious grounds of natural reason and justice. If the whole proceeding is *ex parte* or without notice where notice should be given, or if such be the character of the determinatory act, the law condemns it in *toto*, and disregards it from the beginning." * *

Minors not Named in the Notice.

Minors not *named* in the notice or order to show cause, it will be observed, and there *being* no *description* of the real estate, we think for those reasons, they are not bound under the adjudged cases.

In the case of *Richards* vs. *Rote*, 68 Pa. St., 248, the opinion of the Court being delivered by Mr. Justice Sharswood, and it was held (syllabus):

"In proceedings in partition in the Orphans' Court in order to divest the interest of any person, it is necessary that such person should be *named* in the *petition, decree and notice.*"

In *City of N. O.* vs. "*The Heirs of De St. Romes*," 28 La. Ann., 17, it was held that a notice published addressed to "The Heirs of De St. Romes" too indefinite to be valid.

The following cases hold that a person must be *named* in the notice to bind him, *Bush* vs. *Williams*, Cooke (Tenn.), 360, where the Court said:

"No man can be bound by a proceeding to which he is not a party, and to make him a party he must be named."

In *Rogers* vs. *Haskins*, 14 Ga., 166, it is said: "Notice in name of nobody is no notice."

Also in point are the following:

Carver vs. *Carver*, 64 Ind., 196; *Hickenbothan* vs. *Blackledge*, 54 Ill., 318; *Philadelphia* vs. *Miller*, 49 Pa. St., 448–9.

Judicial *power* of various States of the Union, including Probate Courts, as contained in their *Constitutions*, where partition in such Courts has been recognized, is substantially as follows:

Alabama, Art. V, Secs. 1 and 9, expressly grants to the *General Assembly* the power to "direct, ordain and establish such inferior Courts of law and equity" as it may will to do.

Connecticut, Art. V., Sec. 1: "The powers and jurisdiction of which Courts shall be defined by law."

Louisiana, Title IV, Art. 78, is as follows: "The District Courts shall have original jurisdiction in all civil cases, * * and in all matters connected with *successions* their jurisdictions shall be unlimited."

Maine, Art. VI, Sec. 1: "The judicial power of this State shall be vested in a Supreme Judicial Court, and such other Courts as the Legislature shall from time to time establish."

Massachusetts, Chap. I, Arts. I and III, confers very full and almost unlimited power on the "General Court of Massachusetts" in regard to erecting and constituting judicatures and Courts of record and other Courts.

New Hampshire, Part Second, Secs. 2, 3, 4 and 5, confers same powers on "General Court" to establish Courts as that of Massachusetts.

Constitution of 1790 and 1838 of Pennsylvania, Art. V, Sec. 6, confers ample powers to vest any of the powers conferred on Court of Common Pleas, to vest those powers in such other Courts as they shall judge proper.

South Carolina, Art. IV, Secs. 1 and 20, defines and limits the jurisdiction of each Court very similar to California, and the power to make partition in Probate Court construed in

Davenport vs. *Caldwell*, 10 S. C., 348.

Tennessee, Art. VI, Secs. 1 and 8: "The jurisdiction of such inferior Courts as the Legislature may from time to time establish shall be regulated by law."

Constitution of Vermont, Sec. 21 of Chap. II, confers ample power on the judiciary of the State in such matters.

Wisconsin, Art. VII, Secs. 2 and 14, leaves the JURISDICTION, POWERS and DUTIES to be prescribed by law. See Gary's Probate Law, Sec. 696.

In comparing the various Constitutions with California, and the adjudications of our State in reference to the *clear* and mandatory provisions of our Constitution, it will be seen that in the one class, the judicial power is given to the Legislature, while in California and all modern Constitutions, the judicial power is *defined, limited* and *distributed* by the *Constitution* itself.

The partition proceedings in Probate Courts originated in Massachusetts, and the several States substantially adopted the same law. Gary's Probate Law, Sec. 24 and Sec. 708, note 27—but did not the Constitution.

IV.

Notice by Publication only, to all Interested in the Estate in the Partition Proceedings Once a Week for Four Successive Weeks.

The Court ordered notice of the settlement of final account, distribution and partition, all in *one* notice, and to be given by publication, and to be published in a *daily* paper *once* a week for four *successive* weeks (Trans., page 18), under Secs. 1539, 1634 and 1638, C. C. P. of California, which read as follows:

Section 1634. "If the account mentioned in the preceding section be for a *final settlement*, and the estate be ready for distribution, the *notice* of the settlement must state *those facts* and *must* be *served, published*, or *waived* in the same manner as provided in Section 1539 of this Code, relating to sales of property; and, on confirmation of the final account, *distribution* and *partition* of the estate to all entitled thereto may be immediately had, without further notice or proceedings. If, from any cause, the hearing of the account or the petition and distribution be postponed, the order postponing the same to a day certain, is notice to all persons interested therein."

Sec. 1539. "A copy of the order to show cause must be *personally* served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee or devisee, or heir of the decedent, *provided* they are *residents* of the county, at least ten days before the time appointed for hearing the petition, or be published *four* successive weeks in such newspaper in the county as the Court or Judge *shall* direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time."

Sec. 1638. "The account must not be allowed by the Court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the Court, and is conclusive evidence of the fact."

It will be observed that there was no affidavit *for* publication of the notice, order to show cause, etc., in the record, and none in fact made.

By looking at said Sections 1539 and 1676, page 20 of this Brief, it refers to absent parties or those *out* of the county, but says nothing as to *how* Court may know such fact. Section 1713, found on page 22 of this Brief, provides for the rules of practice in Probate matters, and by turning back to Section 412 of Part II, it will be noticed that the *fact* of non-residence, etc., must appear *by affidavit;* but Sections 1539 and 1676 are silent otherwise than by reference to said Section 1713, which provides for rules of practice in civil cases.

The construction given to sections of the Political Code on Foreclosure of Certificate of Purchase was that there must be an affidavit for publication, or the Court acquires no jurisdiction, and judgment rendered without such affidavit void.

People vs. *Applegarth,* 64 Cal., 229.
People vs. *Mullan,* 65 Cal., 396.

That is the Codes construed as if one Statute. By reference to the above cases, it will be seen that the Statute provided for service of summons by publication, but, like the Probate proceeding, it was silent in what cases it applied.

Defective Affidavit of Publication.

The affidavit or proof of service found in the record (Transcript, page 45), shows that said notice was published *once* a week for *four* weeks, commencing February 18, 1875, and ending March 18, 1875.

We claim such affidavit fatally defective, and not showing a publication four *successive* weeks or once a week for four *successive* weeks, as the Statute directs.

One whole week might have been omitted, and affidavit literally true (1 Wend. Reports, 90); also it might have been published on *different* days of the week, and still affidavit be true; but such proof would not be sufficient under the authority of

Williams vs. *Sacramento Co.,* 58 Cal., 238.

In the last case the Court said: "The statutory publication was one of the jurisdictional steps in the proceedings, and as the petition in question was not published in accordance with the requirement of the Statute, all of the subsequent proceedings were invalid."

In the last case the Court did not pass upon the question whether a publication in a daily paper only *once* a week would be a compliance with the law. Certainly, one paper in a week would not satisfy a subscriber for a daily paper; but is the law to be less strictly followed in case of a subscriber than in case where one is to be divested of all his property?

A recent case in Montana shows how strict Courts are as to jurisdictional questions.

In re Estate of Charlebois, deceased, 12 Pac. Reporter, 775,

where C. J. Wade, delivering opinion of Court, held that under Rev. Stat. Mont., p. 195, Sec. 13, requiring that notice of the hearing of a petition for the probate of a will shall be published at least three times upon three different days of publication when published in a weekly newspaper, and Sec. 16, p. 195, providing that at the time of hearing the Court must require proof that the notice has been given, which being made, it must hear proof of the will, the Court has no jurisdiction until these requirements are complied with; and where the notice of hearing is published only twice in a weekly paper, an order admitting a will to probate and appointing an administrator, with the will annexed, is void. Although under Rev. Stat. Mont., p. 192, Sec. 1, the records, judgments and decrees of courts of probate in the territory have the same force and effect as those of courts of general jurisdiction therein, yet where an order of a Probate Court admitting a will to probate recites that notice of hearing proof of the will was published according to law, such order is not conclusive on that point when the records show that the notice was not published the number of times required by law.

The following cases are in point, that affidavits should state *facts* and not be left to inferences, conjecture or conclusions:

Forbes vs. *Hyde*, 31 Cal., 350; *Craig* vs. *Barker*, 4 Dana, Ky., 600; *Nelson* vs. *Pierce*, 6 N. H., 194; *County Com.* vs. *Clark*, 36 Md., 220; *Bragdon* vs. *Hatch*, 77 Me., 433.

In the last case it was held that notice of foreclosure "*published*" in the county not a compliance with the law that requires it to be in a paper "*printed*" in the county.

By the *mandatory* terms of Sec. 1638, "The account *must not* be *allowed* by the Court until it is *first* proved that notice has been given

as "*prescribed;*" that is, *served, published* or *waived* as provided by said Sec. 1539, and decree must show *such* proof was made.

The decree and special findings VII, VIII, IX and X, do not show *such* proof was made, but the contrary.

Exhibit B, Trans., pages 18 and 19, and Special Findings VII, VIII and IX, show that Final Account, Petition for Distribution and Partition, were all filed February 18th, 1875, and March 23 set for hearing, and on March 23, 1875, the matter was duly continued till March 29. Certainly, there could not be four weeks' publication and ten days besides, between those dates. *Personal* service *must* be ten days before the time fixed in the petition, or four successive weeks' publication as its equivalent, on most favorable construction.

Section 1866, C. C. P. Cal., reads thus: "When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted."

Such is the law under the following cases:

Durfree vs. *Abbott*, 50 Mich., 284; *Mulligan* vs. *Smith*, 59 Cal, 230; *Stuart* vs. *Palmer*, 74 N. Y., 183.

In case of personal service ten (10) days, exclusive of day of service, is given to object to the proceeding, and when the time commences is from *date* of service is well understood.

On constructive service by publication, there could not be less than ten (10) days after completion of service, otherwise service by publication must be construed as complete on the first day of publication instead of the last day, in order to afford a person opportunity to defend his case or estate.

The phrase, ("at least ten days before the time appointed for hearing the petition,") is between commas, just as if put in parenthetically, and the *four successive* weeks publication must be read in connection with it to make sense, otherwise no definite time fixed for the four successive weeks of publication, whether before or after the time fixed for the hearing. But said Section 1539 would seem to mean something by the *mandatory* term, that there *must* be *personal* service on heirs, etc.; "*provided they are residents of the county,*" otherwise there would seem to be an inference, at least, that non-resident heirs require no notice, but the last clause of said section is not consistent with that construction or implication, for it requires *all interested* in the estate to *consent* to the order, that *notice* may be *dispensed* with.

In case of personal service ten (10) days, as before stated, are given to examine proceedings, employ counsel and object, if one thinks proper, but in the constructive service, by publication, no time is given if the matter can be heard on the 29th day after first publication, unless he is presumed to see notice, at least ten days before the day set for hearing.

It must be very evident that there is no time between the first and last publication of the notice one would be *presumed* to see the notice to show cause why he should not be divested of all title to his property; hence to give said section any reasonable meaning, so that it may accomplish the object of giving *notice* and an opportunity to object, it should receive a reasonable construction consistent with natural right.

C. C. P., Sec. 1866.

The phrase, "*provided they are residents of the county,*" was inserted into the law (Sec. 1539) after the remarks, in the case of *Pearson* vs. *Pearson*, 46 Cal., 635, and to give said words any force consistent with reasonable construction, said Section 1539 means that there *must* be *personal* service on heirs, etc., provided they are residents of the county, or if not, then by publication.

Residence or non-residence in the county is jurisdictional, and the Court is to order notice upon a sufficient showing as a matter of course, as Sec. 1713, C. C. P., expressly provides that Part 2, of this Code, constitute the rules of practice in the proceedings mentioned in the Title "of Proceedings in Probate Courts."

Sec. 1294, Code Civil Procedure, is mandatory that administration must be granted in the county in which decedent was a resident; consequently the administration being regular till application for partition, the minors must have been residents of said county where administration granted. Findings VII, VIII and IX, conclusively show, we think, Partition Proceedings a nullity.

In *Earle et al.* vs. *McVeigh*, 91 U. S., 508, the Court said:

"Doubtless constructive notice may be sufficient in certain cases, but it can only be admitted in cases coming fairly within the provisions of the Statute authorizing Courts to make orders for publication, and providing that the publication, *when made*, shall authorize the Court to decide and decree. *Hollingsworth* vs. *Barbour*, 4 Pet., 475; *Regina* vs. *Lightfoot*, 26 Eng. L. & Eq., 177; *Nations* vs. *Johnson*, 24 How., 205; *Galpin* vs. *Page*, 18 Wall., 369."

The order of publication of notice in this case would not stand

the test of the above decision, it is very evident, from inspection of the same.

Mr. Blackwell, in his work on Tax Titles, Chapter XII, * page 211 of the 3d edition, says:

"So strict is the rule, that where a proceeding of a judicial nature is authorized and the statute is *silent* as to notice, the adjudication will be void unless notice is given to the party in interest." Citing *many* authorities.

The author then proceeds to *draw* the distinction, in a proceeding contrary to the course in the common law Courts, and that in special proceedings where the notice must be set forth in the *record*.

In a large city where there are twenty or thirty daily papers and no one paper contains all the notices in such cases, it would be no easy task to find a notice that is published only once a week for only four weeks (and we hardly think the title to property is in so unsafe tenure, under the Constitution of the United States), so that one must spend his time, while residing in the city or county where his real estate is situate, and perhaps living on the very property, to examine every daily paper to see if his property is not for sale or to be transferred to some one on constructive service.

Parson on Partnership, * page 419, in regard to such notice, says:

* * * "But the prevailing rule now seems to be—at least in this country, where, as has been said, we have no one newspaper in which merchants may expect to find all information of this kind—that it is not enough, of itself, to prove that the very number of the paper containing the advertisement was delivered at his house, or even traced to his hand. And, in point of fact, the multiplication of newspapers, to say nothing of their size, seems to forbid all reasonable inference, that he who takes a newspaper, or even reads in it, reads the whole of it, or becomes apprised of all the facts stated in it. But if it could be shown that the customer's attention was, in any especial way, drawn to the advertisement, even, perhaps, by being placed prominently before him, the evidence might be thus made sufficient. But our Courts seem to be tending, *wisely*, as we think, to the requirement of personal notice, by circulars, to all the customers of the firm, if the old name is retained."

The argument applies to the proof of service on file in the case, as well as to the affidavit nine years after, and the special finding thereon.

But we submit that it would be establishing a very dangerous precedent to allow proof *aliunde* the record in a case to help out proof of service by publication, or otherwise. If the door is to be

now opened by this Court, certainly there is no other judicial power in this nation that can close it, and fearful might be the consequences. Rights to property would depend not on judicial records, the highest and most sacred of records in the land, but on proof that may exist in fact, outside the record, but not produced until occasion might require it.

If jurisdiction is not obtained by filing a sufficient petition, or on filing legal proof of service of it, when can it attach?

Again, this affidavit of Mr. Roach, contained in the bill of exceptions, (Trans., page 45), was never made a record in the Probate Court proceedings, and I hardly think it could relate back by *nunc pro tunc* order; for such orders are usually made where the *delay* has arisen by act of the *Court*. (Bouv. Law Dic., vol. 2, p. 250.)

When the *want* of jurisdiction attaches to a probate proceeding, all subsequent proceedings are void, and I never heard of a way before to help it out in another Court.

In the case of *Sigourney* vs. *Sibley*, 32 Am. D., 251; 21 Pick, 101; Chief Justice Shaw delivering the opinion of the Court, decided that the grant of letters of administration by a Probate Judge, who was a creditor of the estate, was void, and that a *partition* of the estate afterwards, when he was not interested, was void also.

The statute, in mandatory terms, says: Section 1638. No account must be settled until statutory or prescribed proof filed.

If the proof was not produced till the defendant produced it, in another Court and case, it certainly would not aid him, or make a case good prior to that, which was long after suit brought. *Reis* vs. *Graff*, 51 Cal., 86; *Morris* vs. *Phelps*, 5 John., 54.

In last case Chief Justice Kent said: * * "The rights of parties must be determined according to the existence and extent of those rights when the action is commenced."

It is easier to decide a case upon the facts before the Court than to lay down general rules that will apply, for it takes a great jurist to lay down rules that can be followed and applied.

MacNamara on Nullities—Law Library Series, Vol. 87, page 20, *et seq.*, Part II—says:

"It has also been decided that if a proceeding be expressly directed to be taken by a statute, its omission amounts to a nullity." Citing

Mortimer vs. *Pigott*, 2 Dowl., 616.
Garrett vs. *Hooper*, 1 Dowl., 28.

Irregularity and a Nullity Distinguished.

The distinction between an irregularity and a nullity is given by Mr. Justice Coleridge in *Holmes* vs. *Russell*, 9 Dowl., 487; cited and approved in *Clapp* vs. *Graves*, 26 N. Y., 420, and is as follows:

(1.) "It is difficult, sometimes, to distinguish between an irregularity and a nullity, but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

"An irregularity," he says, "can be waived, a nullity never can be waived."

(2.) The second rule is defined by this Court in that well considered case of *Galpin* vs. *Page*, 18 Wal., 369:

That in a proceeding to divest an infant of his title to property not in the course of the common law on constructive service, every principle of justice exacts a strict and literal compliance with the statutory provisions. (See Cala. Index Digest by Gear, under head of *Title*, p. 908.)

(3.) The third rule, as established by an unbroken line of modern decisions, is that an infant cannot waive any rights or consent away their rights without service of process at least

Bloom vs. *Burdick*, 1 Hill., (N. Y.,) 139.

Very few cases in the United States have been cited and approved more frequent than this.

Bank U. S. vs. *Ritchie*, 8 Pet., 128;
Wait's Act. and Defenses, Vol. 7, p. 147;
Winston vs. *McLendon*, 43 Miss., 254;
Shaw vs. *Gregoire*, 41 Mo., 407;
Waterman vs. *Lawrence*, 19 Cal., 210;
Randolph vs. *Bayue*, 44 Cal., 367;
Estate of Sweigert, Myrick's Reports, 152;
Ivey vs. *Ingram*, 4 Cold. Ten., 129;
Fischer vs. *Fischer*, 54 Ill., 231;
U. S. Digest, N. S., Vol. V, p. 249, Sub. 143.

(4.) That before a guardian *ad litem* can be appointed to represent an infant in any case or proceeding there must be first legal service of process or the appointment of guardian, or appearing of attorney absolutely void and does not confer jurisdiction.

Ins. Co. vs. *Bangs*, 103 U. S., 435;
Johnson vs. *S. F. S. Union*, 63 Cal., 554;
Winston vs. *Mc Lendon*, 43 Miss., 257;
Carver vs. *Carver*, 64 Ind., 125;
Campbell vs. *Campbell*, 63 Ill., 463;
Clark vs. *Thompson*, 47 Ill., 25;
Johnson vs. *McCabe*, 42 Miss., 255;
Shaw vs. *Gregoire*, 41 Mo., 407;
Richardson vs. *Rote*, 68 Pa. St., 248;
Cox vs. *Story*, 80 Ky., 64.

The rule laid down in *Galpin* vs. *Page*, 18 Wall., 369, and ever since followed, has been universally accepted by bench and bar as the sound and true rule to follow, and meeting such approval, it will remain as firm and unreversible in the jurisprudence of our country, as the battle of Waterloo in history.

V.

Incompetent Evidence to Prove Publication of Notice Nine Years After Order was Made, and in Another Case.

The defendant, under plaintiff's objections, (Trans., page 45) introduced on the trial of this case, which was some nine years after the probate case ended, an affidavit to prove publication of the notice (Order to Show Cause), and we claim that was clearly error, which calls for a reversal of the judgment.

The rule of law, as to the *return* of process, required to give jurisdiction was stated by Mr. Justice Cowen in

Steuart vs. *Smith*, 17 Wend., 517,

as follows: "*It is a regular return only that can give jurisdiction.*"

The following authorities, from different States, establish the same doctrine, and also that, "*if the* RECORD *is deficient or imperfect, it cannot be assisted or aided by evidence dehors the record.*" (14 Ill., 351.)

Bardsly vs. *Hines*, 32 Iowa, 158; *Merrill* vs. *Montgomery*, 25 Mich., 73; *Helms* vs. *Chadbourne*, 44 Wis., 60; *Denning* vs. *Corwin*, 11 Wend., 651; *York* vs. *Crawford*, 42 Miss., 508; *Hendley* vs. *Baccus*, 32 Tex., 328; *Vandiver* vs. *Roberts*, 4 W. Va., 493–533; *Coffer* vs.

Yates, 28 Ark., 43; *Barnett* vs. *Wolf*, 70 Ill., 76; *Chambers* vs. *Jones*, 72 Ill., 278; *S. P. R. R. Co.* vs. *Superior Court*, 59 Cal., 473.

In case of

Hall vs. *Graham*, 49 Wis., 554,

the Court uses following language:

"The motion papers for an amended return were submitted after the decision of this case; but it was too late to make such an amendment of the record as would cure the error, after the appeal. The defect was *jurisdictional* and could *not be cured*.

"*Proof* of service of the summons is a condition precedent or prerequisite to the rendition of a judgment by default * *."

Matterson vs. *Smith*, 37 Wis., 333.

In *Young* vs. *Thompson*, 14 Ill., 381, C. J. Treat says:

The rule is, that a record imports verity, and must be tried by itself. It must be complete and *perfect* in itself without reference to extraneous circumstances. If deficient or imperfect, it cannot be assisted or aided by evidence *dehors* the same."

It may be shown *aliunde* the record, where *rights* are claimed under a judgment, that the Court never acquired jurisdiction of the person or had power to make a judicial record, but such is the exception to the rule and the *only* exception.

Earle vs. *McVeigh*, 91 U. S., 507; *Thompson* vs. *Whitman*, 18 Wal., 457; *Bordutha* vs. *Goodrich*, 3 Gray, 509.

Sec. 1916, C. C. P. of California, reads as follows:

"SEC. 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the Court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings."

There is no section in California codes that provides for supplying omissions in the records to cure or supply jurisdictional defects. In fact, the Supreme Court of California have decided that the Legislature could not validate or infuse life into a void judgment.

Pryor vs. *Downey*, 50 Cal., 388; *Reis* vs. *Lawrence*, 63 Cal., 138; *Brady* vs. *King*, 53 Cal., 44.

Such a rule, as prescribed by said Sec. 1916, is but in furtherance of natural right, that a person cannot be deprived of property

without due process of law, and a good reason for the rule is given by C. J. Shaw in 3 Gray *supra*, that the evidence is to show that the Court never had any power or authority to make a record, and that the record made is not a binding record, because the very first element is wanting, to-wit, *due notice*. But such a rule does not imply that if the record fails to show jurisdiction, that fact can be supplied *aliunde* at all times and on all occasions.

The one merely shows that the party was never bound by the record, and to that extent impeaches it; and the other that the record, as the Supreme Court of Maine, after reviewing many cases, said,

P. R. R. Co. vs. *Week*, 52 Me., 459,

impeaches itself, and thus showing the judgment null and void. Also *Gray* vs. *Hawes*, 8 Cal., 562, is to the same effect.

If life can be infused into a judgment, dead nine years, by adding to the record, I submit there is no limit, by Statute of Limitations or otherwise, and that judgments pronounced void or dead for the last fifty years can thus be brought to life by *affidavits*, if the record affirmatively shows such want of jurisdiction.

Gary's Probate Law, Section 25, is as follows:

"But as the proceedings are not according to the course of the common law, and cannot be reviewed upon common law process, they are not merely voidable, if the want of jurisdiction appears, but void.

"If it appears affirmatively from the record it is fatal to the proceeding. The whole record is a *continuous* record, and if the original appointment of an administrator is void, all the subsequent proceedings are void."

As before stated, minors were entitled, under the Constitution, to a trial in a case *involving* their title to real property in a District Court, which was according to the course of the common law.

Freeman on Executions, Section 358, lays down the rule in regard to *amending* returns, as follows:

"In the return of process, as in all other acts, mistakes may be made * * *. When it has once been filed, the return becomes a matter of record, and cannot be amended without permission of the Court * *."

Citing a vast array of authorities.

In *Brown* vs. *Scegell*, 22 N. H., 552, it was held that defective

records in the Probate Court in a *partition* case could not be aided by parol.

The rule is that statutory proceedings in a court of record in any case or special proceeding, not according to the course of the common law, the *record* must show jurisdiction, and the whole record should be resorted to.

Galpin vs. *Page*, 18 Wal., 371; *Harper* vs. *Rowe*, 53 Cal., 234; *Gray* vs. *Hawes*, 8 Cal., 569; *Winston* vs. *McLendon*, 43 Miss., 257; *Fairfield* vs. *Gulliver*, 49 Me., 360; *Platt* vs. *Stewart*, 10 Mich., 260, and cases cited; *Hendrick* vs. *Cleveland*, 2 Vt., 329; *Higginbottom* vs. *Thomas*, 9 Kan., 326; *Davidson* vs. *Clark*, 14 P. R., 663.

If the original affidavit, filed March 23, 1875, (Trans., page 46) is insufficient, as the affidavit of Mr. Roach clearly shows it is, (Trans., page 45) because facts not stated to show four successive weeks, then the judgment should be reversed with directions to enter judgment for plaintiffs. Even a petition as defective as said affidavit would not confer jurisdiction in a special proceeding.

In the case of

People ex rel. Green vs. *Smith*, 55 N. Y., 137,

the petition was defective, or not in full compliance with the statute, and it was held all the proceedings founded thereon void.

In conclusion of this proposition in the case, we will merely say that the authorities in this court, in California, and in every court of last resort in this country and England, so far as I can find, hold that the *entire* record is to be *inspected* where a question of jurisdiction arises or is called in question and not matters *outside* the record.

If affidavits in other cases to supply matters of jurisdiction are to be received, one might be obliged to inspect records in different cases, in different courts, in different parts of the State, where, perchance, original records might have been used as evidence.

VI.

Infants Must Appear by Guardian and Not by Attorney. Under California Statute.

The authorities heretofore given establish the rule under statutes like ours, that infant defendants can only appeal *by guardian* after legal service.

The statute of California is as follows:

Sections 372 and 373, Code of Civil Procedure of California, read thus:

"SEC. 372. When an infant is a party he must appear by his general guardian, if he has one, and if not, by a guardian who may be appointed by the court in which the action is prosecuted, or by a judge thereof or a county judge."

"SEC. 373. When a guardian is appointed by the Court he *must* be appointed as follows:

"1. * * * * * * * * * * * *

"2. When the infant is defendant upon the application of the infant, if he be of the age of fourteen years, and apply within ten days *after* the *service* of the summons, if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant."

Townsend vs. *Tallant*, 33Cal., 45; *S. F. S. Union* vs. *Johnson*, 63 Cal., 554; *Waterman* vs. *Lawrence*, 19 Cal., 210.

Section 1718, next hereinafter inserted, is not intended to confer jurisdiction of the minors on the court, without service, but merely to aid the court in its labors.

Section 1718, C. C. P. "At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions and distributions of estates; setting apart homesteads; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court must appoint some competent attorney at law to *represent*, in all such proceedings, the devisees, legatees, heirs or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and may, if he deem it necessary, appoint an attorney to *represent* those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent. The attorney may receive from the distributive shares of the estate set apart for the parties whom he represents, a fee not exceeding fifty dollars for his entire services; if there is no distribution of the estate, this fee must be paid out of the funds of the estate as necessary expenses of administration.

"If, for any cause, it becomes necessary, the Probate Court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided."

The old probate law contained like provisions, Sections 17, 18 and 295, which were as follows:

SEC. 17, Belknap's Probate Law. "At the time appointed, or at any time to which the hearing may be continued, upon *proof* being made, *by affidavit or otherwise, to the satisfaction of the Court*, that notice has been given as required in the preceding sections, the Court shall proceed to hear the testimony *in proof of* the will.

"SEC. 18. Any person interested may appear and contest the will. If it appear that there are minors, *or persons residing out of the county, who are interested in the estate*, the Court shall appoint some attorney to *represent* them."

"SEC. 295. When upon any proceeding in an estate an attorney has been appointed for minors and absent persons in interest in the estate, such attorney shall represent such parties in any subsequent proceedings had, unless on such subsequent proceedings another person be appointed, and provided such attorney be present in Court in such subseqent proceedings.

"When any such attorney has been appointed, and when the probate judge has appointed a referee to take proofs, make computations, or perform other service, a reasonable compensation may be allowed, out of the estate, to such at'orney and to such referee for the services he may have rendered."

The Supreme Court of California decided that the *appointment* of *attorney* to *represent minors* before service, a *nullity*.

Randolph vs. *Baque*, 44 Cal., 370; see *Baker* vs. *O'Riordan*, 65 Cal., 368.

Said Section 1718 was construed by Judge Myrick, late of the California Supreme Court, in the Estate of Devoe, 1 Myrick's Probate Rep., 6, and Estate of Camelo, 1 Myrick's Probate Rep., 75, where it was held that the attorney appointed by the Court could not waive minor's right to apply for revocation of the probate of a will; also that the appearance by such attorney upon probate, does not bind the minor in the premises, because the statute provides he must *appear* by *guardian*.

Estate of Bartels, 1 Myrick's Probate Rep., 130; see *Thomas* vs. *Mahon*, 9 Bush, Ky., 125,

which hold that the appointment of an attorney by the Court does not give jurisdiction. If it was the object of said Section 1718 to confer jurisdiction on the Court of the persons of infants *without notice*, then under the authorities before cited it is *unconstitutional* and *void*. But as said sections have been construed by Courts of California, it is not usual for this Court to change the construction of the statute law.

Section 33, Civil Code of California, is mandatory that a "minor cannot give a delegation of power."

Section 42, Civil Code of California, is as follows:

"A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian *must* conduct the same."

The record then showing that said minors were never *named* in the notice, and no real estate described in said notice (Trans., pages 18, 46), and no proof even of a substantial compliance with the statute as to service of said Order to Show Cause, the appearance, by an attorney for said infants, was a nullity even under California decisions. See also,

Randolph vs. *Baque*, 44 Cal., 367; *S. F. S. Union* vs. *Johnston*, 63 Cal., 554; *Merced Co.* vs. *Hicks*, 67 Cal., 108; *Baker* vs. *Riordan*, 65 Cal., 368; *Lent* vs. *Tilson*, 14 P. R., 71.

It will be observed that said Section 1718 uses the word "*represent*," and not "*appear for*." That is, said attorney so appointed is to merely represent the persons named in order of appointment, but that does not imply that such attorney could *appear* for and waive service, for the statute is that infants *must appear* by guardian, etc., after service.

By looking at other provisions of the statute it will be observed how the rights of infants are carefully protected.

Sections 1747 and 1749, C. C. P., expressly allows a minor, over fourteen years old, the right to nominate (subject to approval of the Court) his own guardian *after* personal service of citation on him.

See *Lord* vs. *Hough*, 37 Cal., 657.

The authorities under similar statutes also hold, that the appointment of a guardian without statutory service is an absolute nullity. *Hathaway* vs. *Chase*, 5 Pick., 491; *Schneider* vs. *McFarland*, 2 Com. (N. Y.), 459; *Palmer* vs. *Oakley*, 2 Doug. (Mich.), 433; *Perry* vs. *Brainard*, 11 Ohio, 442; *Bloom* vs. *Burdick*, 1 Hill, 141.

The record shows that Horace Hawes, one of the plaintiffs herein, was over fourteen years of age in 1875 (Trans., page 8), and had a statutory right to have a voice in selecting his guardian after being served by *citation*.

"A citation must be served in the same manner as a summons in a civil action," is the language of the statute, C. C. P., Sec. 1709.

Sec. 411, C. C. P. of Cal., provides how a summons must be

served, to-wit: personally; and Sec. 412, C. C. P., provides for an exception to the general rule where the person resides out of, or has departed from, or cannot be found in the State, and the *fact* appears by *affidavit*, etc.

Said minor was deprived of such statutory right in the case, and we hardly think that is not a matter of substance.

Most certainly an adult cannot be deprived of his life, liberty or property without service on him in the manner prescribed by the statute, and *a fortiori* an infant.

As Mr. Justice Bronson said in *Bloom* vs. *Burdick*, 1 Hill, 141, in regard to service of minors, "The rule cannot be relaxed without opening a door to the greatest injustice and oppression."

There was no showing that said minors were absent from the State or county in 1875, and I know of no presumption of law that they were.

It is plain, therefore, on principle as well as established by authority, that no Court whose *jurisdiction* is *prescribed, defined* and *limited* by the *statute* can dispense with statutory service on a person, or infants, by appointing an attorney to represent them in a matter where notice is expressly required to be given them.

The doctrine of the conclusiveness of judgments rendered without due service of process and the fallacy of reasoning in support thereof, was thoroughly examined and, we think, completely exploded in the case of

Ferguson vs. *Crawford*, 70 N. Y., 263,

as will appear from a few sentences of the opinion: * * *

"The plaintiff in effect declares to the defendant, the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity and the record makes the appearance an unimpeachable fact."

On such reasoning a man, though living, might be conclusively estopped to disprove the fact that he was not dead, in case being absent from home seven years, and administration on that presumption, should be granted on his estate. California is not without a precedent in such a case.

Stevenson vs. *Superior Court*, 62 Cal., 60.

In the last case a person's estate went through the regular routine

of probate, and after a supposed dead man's estate was turned into money and used by an active administrator, the man, "*conclusively adjudicated dead,*" appeared "in the flesh" and asked to have all administrative proceeding annulled. The application was resisted as an *irregularity*, and there was remedy by appeal, etc.

Could said atty for said minors have appealed?

VII.

Proceedings of Commissioner and Partition Agreed Upon Must be Reported as Statute Prescribes, or Court Acquires no Power to Partition.

It will be remembered that the fifty-vara lot in controversy was distributed March 29th, 1875, into three equal shares to the said three heirs; that is one-third to each; and each had a right to have his interest therein set apart to him in kind in so far as it could be done without material detriment to the interests of the others.

McGee vs. *Russell*, 4 S. W. Rep., 255. §1679 C.C.P.

Said Section 1684, C. C. P., before given (page 22), *expressly* provides that the commissioners *must* report their proceedings, *and* the partition agreed upon by them to the Court in *writing*, and so the order of Court expressly provides. (Trans. page 24.)

We claim that was never done in this case, but only the conclusions of the Commissioner or "the partition and division" he made.

The Commissioner states he took the oath, gave notice to attorney for minors, etc., and the division he made. (Trans., page 26.)

The Court, it will be observed, can make no partition, but the commissioners must report their proceedings before Court can act.

In *State* vs. *Horn*, 9 Pacific Reporter, 208, it was held that *all* the commissioners must sign the report or it is a nullity.

The Supreme Court of California, by Mr. Justice Sanderson, in

C. P. R. R. Co. vs. *Pearson*, 35 Cal., 258,

defines how the commissioners are to report "*their proceedings in the premises,*" and should embrace the evidence or facts.

See *Brokaw* vs. *McDougall*, 20 Fla., 234; *Newhall* vs. *Thayer*, 16 Mass., 127, as to the necessity of Commissioners reporting *the value* of the property so Court will have some data or facts to act upon.

In *McGee* vs. *Russell*, (Ark.), 4 S. W. Rep., 285, the Court said

* * *

"The land is one body and contains 2330 acres. No fact or circumstance is shown by the report why this large tract cannot be divided. Each party had the right to insist that his interest in the land be set apart to him in kind in so far as it can be done without material detriment to the interest of the other.

"It may be that the land, as the commissioners say, is so situated as to render a division impracticable. If so, the report should show the facts on which they based their conclusions so that the Court may be able to determine whether or not it is well founded. *Horden* vs. *Coyswell*, 5 Heisk, 549. In the absence of such showing it seems to us unreasonable, almost incredible, that partition cannot be made in this case."

In a city, each lot in different locations and on different streets, at least, is a separate holding under that well considered case

Butler vs. *Royes*, 25 Mich., 53.
Freeman on Co. and Part., Secs. 208 and 216.

That a fifty vara lot is capable of division for business or residence purposes the Courts are presumed to know. (54 N. Y., 185.)

The case of *Stallings* vs. *Stallings*, 22 Md., 45, was one for partition on the equity side of the Circuit Court, and the Court there held that it being a statutory proceeding, the statute must be strictly complied with, and that the report of commissioner should show certain *facts* or the defects fatal.

In the case of *Craig* vs. *Barker*, 4 Dana (Ky.), 600, which was a partition proceeding, the Court held that in such a *summary* proceeding in such a forum, the record should exhibit the prescribed proof of a proper service to all concerned.

The declaration that there had been "*due proof of due service*" is only the opinion of the Court and is insufficient, and the opinion concludes that said County Court being special and limited, the record should exhibit *facts* to show the Court had jurisdiction.

A fortiori, where a ministerial officer is to report his proceedings by express order of Court and provision of the law, so Court can draw conclusions from facts and values as to the partition they made.

The value of the property partitioned, where there are several lots in a city, is indispensable as a part of the proceedings for Court to pass upon.

The Court is not allowed, or has no power to endorse or approve the *conclusions* of the commissioners unless *proceedings* are reported *with* the partition agreed upon, as the statute in mandatory terms prescribes. (Said Sec. 1684.) 93 U. S. 282.

It might be a very convenient substitute in a partition case, for Commissioner to write out the partition made by him, and have the Court confirm it; but where is the data on which to review the case? Hence, there are substantial reasons for having "*proceedings*" of the commissioners reported, and the omission is not a matter of form, but one of substance and right under the statute.

In the petition for partition herein (Trans., page 15), in regard to the fifty-vara in controversy, it is alleged as follows:

"The said fifty-vara lot, No. 205, which is subject to a *lease* of an unexpired term of five years to one J. H. Blumenberg, at the monthly rent of $1,000 per month, from the 1st day of March, 1875. Your petitioner will take and *pay* to said heirs what is just, legal and proper, as your petitioner is informed and verily believes the same cannot be *advantageously* divided or partitioned."

The petitioner signed herself administratrix of the estate, it will be observed. (Trans., pages 16–18.)

The statute says (Sec. 1677, *ante*, page 20): "The *estate* (not merely real estate) in each county must be divided *separately* among the heirs, devisees, or legatees, as if there was no other estate to be divided;" * * §1679

Sec. 1680 provides, "When the *real* estate cannot be divided without *prejudice* or inconvenience," (not advantageously) the whole may be assigned, * * and the *true value* must be ascertained and *reported* by the Commissioner.

Sec. 1681 provides that when any tract of land, or *tenement* is of greater value than any one's share and *cannot* be divided without "*injury*," etc., it may be set off in a certain way, *preference* being given the males.

In the case of *Hunt* vs. *Hapgood*, 4 Mass., 120, C. J. Parsons said, in passing upon the power of a Probate Judge to assign to one the interest of another when land cannot be divided "*without* prejudice" etc.: * And this power is given to the Judge only on this condition, and certainly it ought to have appeared on the face of the decree that the Judge was exercising his power in a case to which it extended. *A fortiori* when the *report* of Commissioner must, on its face, show why the real estate cannot be divided without injury and the value thereof, or the Court has nothing to base a judgment upon. As stated by Mr. Justice Bronson, in 1 Hill, 142, a party cannot build up a title under the statute without showing a compliance with its requirements, and those requirements must be strict, where infants are to be divested of their property.

The diagram of city property is on pages 28, 29 and 30 of Transcript, and there is nothing there to suggest why each parcel could not be divided without prejudice.

The plaintiffs had no chance to exercise any choice in the matter, as they had no one competent to appear for them. A guardian can bind a minor, but an attorney never can.

The sums awarded by the Commissioner must be paid or secured, etc., "before partition established," is the mandatory language of the statute, which by plain implication means that *value must* be reported and award made.

There was no award made by the Commissioner (see Exhibit G, Trans., page 15), and under the well considered case approved time and again, *Jenks* vs. *Howland*, 3 Gray, 536, said partition is null and void, on the ground the Court had no power to make partition until the report is made in the prescribed form and the law strictly complied with.

See *Newhall* vs. *Sadler*, 16 Mass., 127.

Said Sec. 1682, C. C. P., provides that "when it appears to the Court from the Commissioner's *report*, that it (real or personal estate) cannot otherwise be fairly divided and should be sold, the Court may order the sale, etc."

When the Court has jurisdiction of the subject matter, an adult can voluntarily come in and waive service and defects, but infants cannot come in or waive or consent, and no one can for them. Hence, when the statute is not substantially complied with, the proceedings as to infants are nullities in all Courts, all the modern authorities hold.

The mandatory provisions of the statute are simply these:

(1.) The whole estate, real or personal, must be separately divided.

(2.) When the whole estate cannot be separately divided, the true value must be reported.

(3.) When a tract of land, or *tenement*, is of greater value than one's share in the *estate* to be divided, and cannot be divided without injury, the award must be made and paid by the party accepting the same, preference being given to the *males*. (16 Mass., 127; 3 Gray, 536.)

(4.) When the *report* shows that the estate cannot be fairly divided and should be sold, the Court may order the whole or any part sold.

The allegation in petition is, that said fifty vara cannot be advan-

tageously divided; hence it was mandatory for an award to be made and paid and not substitute other lands or tenements.

It will be noticed that said Sections 1680 and 1682 only *expressly* provide for *divesting* title, and that is, when the true value of the estate is reported and award made and money substituted for land.

Business men are easy to be found who might exchange real estate that produces $333 per month for money, but not for unimproved land.

I am well aware that the learned counsel for defendant will claim that plaintiff's objections are but irregularities, and not nullities. Such was the contention in *Barrett* vs. *Sims*, 62 Cal., page 440, and many other cases cited, but the Court otherwise decided, holding that it was a question of *power*. 93 U.S. 282.

The distinction between an irregularity and a nullity as given by Mr. Justice Coleridge, *ante* page 36, applies here, because the plaintiffs were infants with no power to waive or consent to a non-compliance with the law, and before their inheritance can be taken away from them, the law must be strictly complied with.

To the same effect is the case of

Whitwell vs. *Barbier*, 7 Cal., 54–64,

where it was decided that if the omission is one of *substance* it is a nullity, but if only of form it is an irregularity.

The Probate Court or Judge had no power except that given by the law, and a misconstruction of the law, where infants are concerned, is a nullity and fatal.

Early vs. *Doe*, 16 How., 616.

In re Grove Street, 61 Cal., 444, it was held that a petition to open street and divest one of property must contain "a statement that in the opinion of the petitioners the public interests required that the improvements, as before stated, be made," and that an averment that in the opinion of the petitioners the improvement asked for should be made not equivalent, and that the Court acquired no jurisdiction, and all proceedings void. Such irregularity amounted to a nullity, because the plain intent of the statute cannot be frittered away in the construction of it.

The net income of said fifty-vara was $1,000 per month, or $333⅓ each, which said minors, under the Constitution of California and the Statute, also Sec. 1666, C. C. P., before given, had an absolute

right to sue for March 30, 1875, the next day after distribution made. (Trans., page 23.) There are plenty of persons who would be willing to take money for an interest in productive property, but would not take other real estate unimproved as a substitute, and I can find no law or precedent to compel one to exchange productive for unproductive property, or to sell his property to another. See *Sumner* vs. *Parker*, 7 Mass., 78, as to the want of *power* of Probate Judge to transfer title from one to another. In that case a decree forty years standing pronounced void.

So strict was the rule at common law as to partition that, in one instance cited by Justice Campbell, in *Butler* vs. *Roys*, 25 Mich., 53, that one person got all the chimneys and stairs; hence, Partition in Equity was resorted to where the right, at law, to a division in kind was modified so as to make an exception, and sell the thing and divide proceeds, when division not equitable. It has therefore been held that where there were *separate* lots in a city, some improved and some not (each being a separate holding), *resort must* necessarily be had to a Court of Equity jurisdiction.

Rutherford vs. *Jones*, 14 Ga., 521.
See *Ward* vs. *Corbett*, 72 Ala., 438.

A Probate Court as such, has no equity powers whatever to adjust the rights in such cases as a *step* in administration, at least.

VIII.

Notice of Making Partition Required to be Given to Parties or Guardian Under Express Provisions of the Law, and It Was Not.

No notice was given to infants or to any guardian, as said Sec. 1670 C. C. P. of Cal., (ante page 22), in *mandatory* terms, requires.

We have before shown under mandatory provision of the Statute or Codes of California that infants must appear by guardian, and when defendants, after due service of process.

The admission of Chas. H. Sawyer of service, as the attorney for said minors (Trans., page 25), who was the attorney appointed to represent the minors in said estate, March 29th, 1875, under said Sec. 1718, C. C. P., we claim was a mere nullity, as that was a *separate* step in the proceedings, that *service was indispensable* before commissioner could proceed, and neither guardian *ad litem* or attorney

could waive the infant's rights or appear without due service by citation. Sec. 1710, C. C. P., inserted on page 52, provides how services must be made unless otherwise provided.

In a partition case in N. H. in Probate Court, the question arose as to the mode of *procedure*, it being admitted that the Court had jurisdiction of the subject matter and the parties,

Brown vs. *Scegell*, 22 N. H., 552,

but as the partition was made without notice by Commissioner, of the time and place of making the same, the partition held null and void.

The Court said: "It hardly admits of a question that a decree founded upon a report of a committee would be merely void, if no notice was given of the time and place when such report would be taken into consideration of all parties interested."

The case of

Thayer vs. *Thayer*, 7 Pick., 212,

is a very strong case to the same effect, and also that a minor cannot waive non-compliance with the Statute.

In the case of *Curtis* vs. *Sacramento*, 64 Cal., 102, it was held that an award by arbitrators, without notice to the adverse party of the time and place of meeting of the arbitrators to hear evidence, was irregular, invalid and void.

It has been held in New York, in the case of *Doubleday* vs. *Newton*, 9 How. Pr., 71, that in a partition case, notice by Commissioners was implied in the law.

Said Sec. 1683, (ante page 22), in *mandatory* terms, says:

"Before any partition is made or estate divided, notice must be given to all persons interested in the partition, * *their guardians, agents* or attorneys, by the Commissioners, of the time and place, when and where they will proceed to make partitions. * *

Evidently said section does not mean attorneys appointed to represent minors, but to such who can, or are competent to employ and appear by attorney.

A minor defendant cannot either employ or appear by attorney A guardian has to give ample bonds to his ward, and has ample powers, under the statute, over the ward and his estate, which an attorney has not.

We submit that notice of *how* and *when* partition is to be made is

a matter of substance, and the most important one in all the proceedings.

Secs. 1707 to 1711, C. C. P., read in connection with said Sec. 1683, (ante page 22), provides for a short and simple notice to the parties themselves. Secs. 1707 to 1711, C. C. P., are as follows:

1707. Citations must be directed to the person to be cited, signed by the clerk, and issued under the seal of the Court, and must contain—

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a time and place specified.

1708. The citation may be issued by the Clerk upon the application of any party, without an order of the Judge, except in cases in which such order is by the provisions of this title expressly required.

1709. The citation must be served in the same manner as a summons in a civil action.

1710. When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation.

1711. When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

One reason that the law must be so strictly pursued, in such special proceedings to divest an infant of his property, is contained in a few lines in the case of

Early vs. *Doe*, 16 How., U. S., 617,

which was a tax proceeding and a sale of the property to satisfy the obligation of the owner to the public for taxes. The Court said, referring to the officer making the sale:

"He may not do anything of himself and do all as he is directed by the law under which he acts. He may not, by any construction of it, anticipate the time for sale." * * *

Thus the law has been construed in all cases of partition in Probate Court where infants are concerned.

Section of the Code of Civil Procedure applicable to probate proceedings is as follows:

"SEC. 1713. Except as otherwise provided in this title, the provisions of Part Two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title."

Said Part Two of said Code provides for the practice to be observed in all civil actions, partitions, etc.

I cannot find a case that has sustained, even on a collateral attack, the appearance of minors by attorney before legal services, and I confidently believe none can be found. Much of what has been said on the two previous points apply here.

IX.

Outstanding Title in Grantees of Intestate at Time of Partition to Part of the Property claimed by the Estate.

Exhibit J of Special Findings (Transcript, page 37), shows that Horace Hawes granted Mission Block 44 to Albert Dibblee and four others, and the order of confirmation reserved their rights (Trans., page 34, Special Finding XXVII).

Under the authority of this Court, in

Barney vs. *Baltimore City*, 6 Wal., 280,

the presence of said grantees was *indispensable* in equity, to confer jurisdiction, *a fortiori* in a Probate Court, otherwise one heir might get nothing. See Freeman on Co. and Part., Sec. 508, as to the impossibility of a "*Partial Partition.*"

Certainly such a proceeding not permitted in a Court of Equity when the title is not clear, but would be sent to a Court of Law to clear up the title.

The District Court of California had both common law and equity powers, and ample provisions made for litigating and adjusting all questions.

Also, under the rule laid down by C. J. Gibson, in case ante page 17, and C. J. Parker, of Massachusetts, before cited, no jurisdiction in Probate Court where decedent had conveyed.

The rule of law as laid down by the adjudged cases is thus:

To obtain partition in Equity it is necessary for the title to be clear and undisputed.

Wait's Actions and Defenses, vol. 5, p. 99, and cases cited; *Hoffman* vs. *Beard*, 22 Mich., 59; *Burhans* vs. *Burhans*, 2 Barb. Ch., 398.

Although a bill in Equity cannot be maintained in partition, until the legal title is determined, yet when a question is raised as to the title during proceedings in Equity for partition, the Court

will order a stay of proceedings until the title can be determined in an action at law.

Wait's Actions and Defenses, vol. 5, p. 99, and numerous cases cited; *O'Dougherty* vs. *Aldrich*, 5 Denio, 338; *Hassan* vs. *Day*, 39 Miss., 392.

No bar or estoppel pleaded, proven, or existing in law or fact, under the following authorities:

Crosby vs. *Doud*, 61 Cal., 598; *Hill* vs. *Den*, 54 Cal., 23; *Joyce* vs. *Joyce*, 5 Cal., 161; *Compton* vs. *Pruitt*, 88 Ind., 173; *Hanlon* vs. *Waterbury*, 31 Ind., 168; *Sims* vs. *Everhardt*, 12 Otto, 300; *Sims* vs. *Bardover*, 86 Ind., 88; *Carwith* vs. *Griffing*, 21 Barb., 14; *Wright* vs. *Cane*, 18 La. Ann., 580; *Bradshaw* vs. *Callaghan*, 5 John., 82; *Bradley* vs. *Amaden*, 9 Paige, 239; *Gillespie* vs. *Nabors*, 59 Ala., 441.

Even a receipt by a party of proceeds of a sale on partition by an adult no estoppel under cases from Ind. *supra*.

CONCLUSION.

It can hardly be claimed that defendant is entitled to protection or mercy from the Court as an innocent purchaser for value, without notice.

McArthur vs. *Scott*, 113 U. S., 405.
Pryor vs. *Downey*, 50 Cal , 401.
Early vs. *Doe*, 16 How., 617.

By reference to the case of *Dougherty* vs. *Fair*, 10 P. Reporter, 674, decided on the authority of *Dougherty* vs. *Coffin*, page 672, same report, it will be seen, that the defendant herein was the *first* to invoke strict compliance with the very letter of the law, before *his* property should be taken from him to pay the laborer for improving the street in front thereof, and presumably a benefit to the same; but it may seem now that the other ox has been gored.

It was strictly a rule of war with defendant in these cases, and not of justice, although the plaintiff had the plainest of equities. Now, in this case, the defendant having shown a disposition to give no quarter, he is not entitled to any mercy.

The Reports and Text Books contain numerous cases in *partition*, but a very few of them in Probate Courts, and even a very large

majority of those that were in Probate Court did not stand the test in a collateral attack even, where the Constitution conferred the jurisdiction, because on face of the record the law was not *strictly* complied with. Hence there can be but little or no apprehension of any serious results to land titles in California, or elsewhere, as far as this case will be a precedent, for, it can safely be said, scarcely a half dozen cases can be found of a partition in Probate Court for the last twenty years, and for the last ten years I can find no case reported of a Partition in the Probate Court. But the rule of law, as laid down by this Court for the last hundred years, is like the Polar Star, only to follow as a true guide, and not to be subject to any deviation for an occasional person who may have gone on the wrong course through error in judgment or carelessness, eyes open or closed.

The able and learned counsel for defendant herein was not so conservative, as to the disturbance of land titles in California, but that he could use his time and talents, and properly so, to overturn a series of decisions on which many had innocently invested their all on title resting on constructive service of summons by publication. I refer to the case of

Belcher vs. *Chambers*, 53 Cal., 635.

Why should not the plaintiff walk through the breach in the wall thus made? The record in the Hawes Estate, however, is all there, or was at the time of the trial of the case, not even a letter erased or a line obscured from its pages, and the defendant must have purchased with his eyes open and with full knowledge of all the defects.

Inasmuch as the defendant *first drew* the sword of strict construction of the law, I have no regrets if he is now pierced by like weapon, which he first so effectually used against myself and client.

We most respectfully submit the judgment should be reversed with directions to enter judgment in favor of plaintiffs.

Respectfully submitted.

J. C. BATES,
Of Counsel for Plaintiffs.